IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 8 19 4

SPOTTSWOOD THOMAS BOLLING, *et al.*,
Petitioners,

v.

C. MELVIN SHARPE, *et al.*,
Respondents.

BRIEF FOR PETITIONERS ON REARGUMENT.

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BLEED THROUGH

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OPINION BELOW.

The final decree of The United States District Court for the District of Columbia is unreported, but appears in the Record (R. p. 19).

JURISDICTION.

The final decree of the District Court was entered on April 9, 1951 (R. p. 19). The notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was given on April 10, 1951 (R. p. 20). Briefs were filed by petitioners and respondents in the United

States Court of Appeals for the District of Columbia Circuit. Before argument, before submission of the case for judgment on the briefs, and before judgment petitioners filed a Petition for Writ of Certiorari in this Court, asking that this Court review the judgment of the United States District Court for the District of Columbia before judgment by the United States Court of Appeals for the District of Columbia Circuit. Certiorari was granted by order of this Court dated November 10, 1952. On December 10, 1952 this case was submitted to this Court on brief and argument, and on June 8, 1953 this Court handed down the following order:

> "8. *Brown* vs. *Board of Education of Topeka, etc.*
> 101. *Briggs* vs. *Elliott.*
> 191. *Davis* vs. *County School Board, etc.*
> 413. *Bolling* vs. *Sharpe.*
> 448. *Gebhart* vs. *Belton.*
>
> Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:
>
> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> (a) that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

Upon application duly had by the Attorney General of the United States and acquiesced in by the parties in inter-

est the date for the oral argument was changed from October 12, 1953 to December 7, 1953.

A motion was made by the petitioners and granted by the Supreme Court of the United States to substitute parties so as to have the personnel of the Board of Education of the District of Columbia to conform with the names of its present members.

This is an appeal from a decree in a civil action denying an injunction and denying an application for a declaratory judgment that the action of respondents, under color of law, in refusing admission of minor petitioners to Sousa Junior High School solely on the basis of race or color was in violation of the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and also in violation of Title 8, United States Code, Section 43, and further was in violation of the Charter of the United Nations, Chapter 1, Article 1, Section 3, Chapter IX, Articles 55(G) and 56, and denying an application for a declaratory judgment that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color in affording them educational opportunities and dismissing petitioners' complaint on the ground that it failed to state a cause of action on which relief could be granted. The jurisdiction of this Court to review by writ of certiorari before judgment in the United States Court of Appeals is conferred by Title 28, United States Code, Sections 1254(1) and 2101(e).

QUESTIONS PRESENTED.

1. Whether the Federal Government in providing educational opportunities for pupils of the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely on the basis of race or color.

2. (a) Whether Acts of Congress which provide educational opportunities for pupils in the District of Columbia compel their segregation solely on the basis of race or color.

(b) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia, compel their segregation solely on the basis of race or color, whether these acts are unconstitutional.

(c) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia permit voluntary segregation solely on the basis of race or color, whether to the extent that this legislation is thus permissive its implementation by actions of respondents to compel segregation of pupils solely on the basis of race or color is unconstitutional.

3. Whether the action of respondents in refusing to admit minor appellants to Sousa Junior High School solely on the basis of race or color violated petitioners' rights guaranteed them by the Constitution and Laws of the United States.

4. Whether the United States District Court for the District of Columbia erred in denying petitioners' application for an injunction and for a declaratory judgment and in granting respondents' motion to dismiss petitioners' complaint on the ground that it failed to state a claim on which relief could be granted.

TREATY AND STATUTES INVOLVED.

Treaty:

Chapter I, Article 1(3), Article 2(2), Chapter IX, Articles 55(c) and 56 of the United Nations Charter, 59 Stat. 1035 et seq.

Statutes:

(A) Title 8, United States Code, Sections 41 and 43.

(B) An Act to provide for the public instruction of Youth in Primary Schools throughout the County of Washington,

in the District of Columbia, without the Limits of the Cities of Washington and Georgetown, May 20, 1862, 12 Stat. 394, Chapter 77, Sec. 35.

(C) An Act providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for other Purposes. May 21, 1862, 12 Stat. 407, Chapter 83.

(D) An Act relating to Public Schools in the District of Columbia, July 23, 1866, 14 Stat. 216, Chapter 217, Sec. 1.

(E) An Act donating certain Lots in the City of Washington for Schools for Colored Children in the District of Columbia, July 28, 1866, 14 Stat. 343, Chapter 308.

(F) An Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1110, was R. S. D. C. Section 281) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI Section 7)].

(G) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1111, was R. S. D. C. Section 282) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 16)].

(H) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1109, was R. S. D. C. Section 283), (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 17)].

(I) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1940, Sections 31-1112, was R. S. D. C. Section 306) (In substance—the Act of June 25, 1864, 13 Stat. 187, 191 Chapter CLVI, Section 18)].

(J) Act of June 20, 1906, 34 Stat. 320, Chapter 3446, Section 7, as amended by Act of July 21, 1945, 59 Stat. 500, Chapter 321, Title V (Section 21 effective July 1, 1945, now District of Columbia Code, 1951 Ed., Title 31, Section 115).

(K) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6 as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1113, was R. S. D. C. Section 310) (originally enacted May 26, 1862, 12 Stat. 407, Chapter 83, Section 2)].

(L) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session, District of Columbia Code, 1951 Ed., Title 31, Sections 669, 670, 671.

(M) Act of February 4, 1925, 43 Stat. 806, 807, Chapter 140, Art. 1, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31 Secs. 201, 207).

STATEMENT OF THE CASE.

On the 11th day of September, 1950, and during the time when respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Columbia attended solely by white children, all of the minor petitioners, Negroes between the ages of 7 and 16 years, citizens of the United States, residents of and domiciled in the District of Columbia, within the statutory age limits for eligibility to attend the public schools of the District of Columbia and subject to the compulsory school attendance law of the District of Columbia, accompanied by their parents, adult petitioners, presented themselves to respondent Eleanor P. McAuliffe, the principal of Sousa Junior High School, for enrollment and instruction therein. The adult petitioners are taxpayers and citizens of the District of Columbia, and are required by law to send their respective children, minor petitioners, to the specific public schools designated by the respondents,

and are subject to criminal prosecution for failure so to do. Act of February 4, 1925, 43 Stat. 806, 807, Ch. 140, Art. I, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31, Secs. 201, 207). Each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 27th day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Lawson J. Cantrell, Associate Superintendent of Schools in charge of the vocational and junior high schools in the District of Columbia, Divisions 1-9 (now Division I), restricted to white pupils. Again each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 31st day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Norman J. Nelson, First Assistant Superintendent of Schools, Divisions 1-9, restricted to white pupils, and to respondent Hobart M. Corning, Superintendent of all the public schools in the District of Columbia, and each denied and excluded each minor petitioner from enrollment and instruction at Sousa Junior High School solely because of race or color.

On the 1st day of November, 1950, the respondent Board of Education of the District of Columbia upheld the actions of the other respondents and itself denied and excluded minor petitioners from enrollment and instruction at Sousa Junior High School solely because of their race or color.

Having exhausted their administrative remedies, thereafter and on November 9, 1950, petitioners, on their own behalf and on behalf of others similarly situated, filed a complaint (R. p. 1) and brought a class suit in the United States District Court for the District of Columbia, against the respondents, members of the School Board and officials of the public school system of the District of Columbia, in their respective official capacities. The action sought a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that the respondents are

without right in construing the statutes having to do with public education in the District of Columbia so as to require said respondents to exclude the minor petitioners from attendance at the Sousa Junior High School and in denying to the minor petitioners the right of attendance at the Sousa Junior High School in violation of their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, by Title 8, United States Code, Sections 41 and 43, and by Article I, Section 9, Clause 3, of the Constitution of the United States, prohibiting legislation in the nature of a Bill of Attainder, and by the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 55 and 56, and further stating that the said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

The action further sought an interlocutory and a permanent injunction restraining respondents, and each of them, their successors in office, and their agents, and employees from precluding the admission of minor petitioners and other Negro children similarly situated to the Sousa Junior High School for no other reason than because of their race or color, upon the grounds that said refusal of admission as applied to minor petitioners or other Negroes similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States, and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 56.

The action also sought an interlocutory and a permanent

injunction requiring respondents, and each of them, their successors in office, and their agents and employees to admit the minor petitioners to attendance in the Sousa Junior High School in conformity with their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and Article I, Seciton 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 56.

Subsequently, the respondents, through their attorneys, filed a motion to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted (R. p. 18). The Honorable Walter M. Bastian, Judge in the United States District Court for the District of Columbia, refused either to grant an injanction restraining respondents from denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, or to issue a declaratory judgment that said denial was in violation of petitioners' rights under the Constitution and laws of the United States, or to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School free of any racial distinctions, and on April 9, 1951, granted the motion to dismiss (R. p. 19). The District Judge at the close of oral argument stated that he was bound by the holding of the United States Court of Appeals for the District of Columbia Circuit in *Carr, et al.* v. *Corning*, 86 App. D. C. 173, 182 F. (2d) 14 (1950), and *Browne, et al.* v. *Magdeburger, et al.*, 86 App. D. C. 173, 182 F. (2d) 14 (1950).

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R. p. 20), and briefs were filed therein. This case has not been set down for oral argument, nor has it been submitted for judgment on the briefs, and no orders with respect thereto have been entered by that Court.

ERRORS RELIED UPON.

The District Court erred:

1. In refusing to enter a declaratory judgment holding that the respondents are without right in excluding minor petitioners from Sousa Junior High School under color of law upon the ground that these actions violate rights secured by the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and by Title 8, United States Code, Sections 41 and 43, and by the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2 and Chapter IX, Articles 55(c) and 56; and in refusing to hold that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

2. In refusing to restrain respondents from denying admission of minor petitioners to Sousa Junior High School for no other reason than because of their race or color, upon the ground that this action is in violation of their rights secured under the due process clause of the Fifth Amendment, and Article VI, Clause 2 of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 56.

3. In refusing to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School in conformity with their rights under the Constitution and laws of the United States, and in refusing to hold that Acts of Congress do not compel racial segregation in the public schools of the District of Columbia, for they would then violate Article I, Section 9, Clause 3 of the Constitution of the United States, and respondents were in error in applying and construing said statutes so as to require the exclusion of minor petitioners from Sousa Junior High School solely on the basis of race or color.

4. In granting respondents' motion to dismiss petitioner's complaint on the ground that it failed to state a claim on which relief could be granted.

SUMMARY OF ARGUMENT.

THE RESPONDENTS HAVE NO POWER OR AUTHORITY TO EXCLUDE MINOR PETITIONERS FROM ADMISSION TO SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR OR TO REFUSE PERMISSION TO ADULT PETITIONERS TO ENROLL THEIR CHILDREN IN SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR.

A.

The Action of the Respondents Violates the Policy of the Federal Government.

1. It volates National Federal Policy.

2. It violates Federal Policy in the District of Columbia.

B.

The Acts of Congress Which Provide Educational Opportunities for Pupils in the District of Columbia Do Not Compel Their Segregation Solely on the Basis of Race or Color.

C.

If These Acts of Congress Are Interpreted As Compelling Segregation of Minor Petitioners in the Public Schools of the District of Columbia Solely on the Basis of Race or Color Then These Acts Are Unconstitutional.

1. These Acts would then deprive petitioners of their rights protected by the due process clause of the Fifth Amendment of the Constitution of the United States.

2. These Acts would then be bills of attainder in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States.

D.

The Action of Respondents Deprives Petitioners of Their Civil Rights in Violation of Title 8, United States Code, Sections 41 and 43.

E.

The Court Below Erred in Not Granting Petitioners the Relief Prayed for and in Granting Respondents' Motion to Dismiss Minor Petitioners' Complaint on the Ground That It Failed to State a Claim on Which Relief Could Be Granted.

F.

The Answers to Questions 4 and 5 Asked by the Court.

ARGUMENT.

THE RESPONDENTS ARE WITHOUT POWER TO EXCLUDE MINOR PETITIONERS FROM ADMISSION TO SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR OR TO REFUSE ADULT PETITIONERS PERMISSION TO ENROLL THEIR CHILDREN IN SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR.

A.

The Action of Respondents in Excluding Minor Petitioners From Admission to Sousa Junior High School Solely Because of Race or Color and in Refusing Permission to Adult Petitioners to Enroll Their Children in Sousa Junior High School Solely Because of Race or Color Violates the Policy of the Federal Government.

Here we are not dealing with the delicate question of State-Federal relations. In this case we are complaining of the action of school officials of the District of Columbia, the Capital of the United States. This is no local setting, this is also the capital of the free world. In this framework the question before the Court is not merely the technical question of the

propriety or reasonableness or even lawfulness of the action of the respondents but it is the basic inquiry as to whether there is constitutionally embedded in the heart of our democracy the seeds of racism or whether, as said by Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson,* 163 U. S. 532, 559. ". . . Our Constitution is color blind . . . " Certain it is that a determination by this Court that the Federal Government may segregate pupils in the public schools in the capital of the United States solely on the basis of race or color and that such action is within the spirit and purpose and meaning of our Constitution would not only be a complete reversal of the position of this Court, but would strip from our democratic system its fundamental and universal appeal to all races and creeds.

Our Federal policy as found in the Constitution, Laws and Treaties of the United States, the executive and administrative acts of the Executive branch of the Federal Government, as well as in the applicable legal precedents interdicts any such determination.

The Federal policy in this regard is revealed in the language of this Court in *Hirabayashi* v. *United States,* 320 U. S. 81 (1943) where it said at p. 100:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Broadly stated, it is the policy of the Government of the United States that the exercise of rights enjoyed by citizens of the United States by virtue of their status as such may not be conditioned on the basis of race or color. This policy has been recognized and effectuated by the executive, the legislative and the judicial branches of the Federal Government. This policy has been given effect not only where the Federal Government is dealing directly with its citizens but also where state action is involved.

1.

THE DECISIONS OF THIS COURT ARE INDICATIVE OF THIS FEDERAL POLICY.

This Court, in a long line of decisions, has developed the doctrine that Government may not condition the exercise of any right it affords solely on the basis of race or color.

In the evolution of this doctrine, this Court has come to view race as an irrational premise for governmental action. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

In *Hirabayashi* v. *United States*, 320 U. S. 81, 100, Mr. Chief Justice Stone characterized racial distinctions as "odious to a free people." In *Korematsu* v. *United States*, 323 U. S. 214, 216, Mr. Justice Black viewed such racial restrictions as "immediately suspect." Mr. Justice Jackson, concurring in *Edward* v. *California*, 314 U. S. 180, 184, referred to race and color as "constitutionally an irrelevance." Mr. Justice Douglas, dissenting in *South* v. *Peters*, 339 U. S. 276, 278, characterized discriminations based upon race, creed or color as "beyond the pale." Mr. Justice Burton, in *Henderson* v. *United States*, 339 U. S. 816, 824, while not reaching the constitutional question raised, described signs, partitions and curtains segregating Negroes in railroad dining cars as emphasizing "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility."

a.

Where State Action Was Involved.

This thesis has pervaded a wide realm of judicial opinion.

Sweeping decisions have secured the right of Negroes to make effective use of the electoral process consistent with the requirements of the Fifteenth Amendment; *Guinn* v. *United States*, 238 U. S. 347; *Lane* v. *Wilson*, 307 U. S. 268; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 73 S. Ct. 809, 97 L. ed. (Advance p. 745).

This Court has defined the Fourteenth Amendment itself, as a broad prohibition against Government enforcement of differentiations and discriminations based upon race or color. Thus, this Court has held that state action restricting the right of Negroes to vote is a violation of the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U. S. 73.

Similarly, it has refused to sanction the systematic exclusion of Negroes from the petit or grand jury; *Hill* v. *Texas*, 316 U. S. 400; *Pierre* v. *Louisiana*, 306 U. S. 354; their representation on juries on a token or proportional basis; *Cassell* v. *Texas*, 339 U. S. 282; *Shepherd* v. *Florida*, 341 U. S. 50; or any method in the selection of juries found susceptible of racial discrimination in practice; *Avery* v. *Georgia*, ... U. S. ....., 97 L. ed. (Advance p. 798).

No state may sanction or enforce racial distinctions in the use, occupancy or ownership of real property; *Buchanan* v. *Warley*, 245 U. S. 60, even though applied equally to Negroes and white persons; *Shelley* v. *Kraemer*, 334 U. S. 1; *Barrows* v. *Jackson*, ... U. S. ....., 97 L. ed. (Advance p. 961); and see *Oyama* v. *California*, 332 U. S. 633.

At the graduate and professional school level, closest to this case, racial distinctions as applied have been struck down. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; see *Sweatt* v. *Painter*, 339 U. S. 629.

State laws requiring racial segregation in interstate commerce have been declared an invalid invasion of commerce power reserved to the Congress. *Morgan* v. *Virginia*, 328 U. S. 373. But where a state sought to enforce against an interstate carrier its local nondiscriminatory policy, its invasion of the commerce power was upheld. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

The only way in which the decision in the *Morgan case* can be reconciled with the decision in the *Bob-Lo case* is to say that there is a Federal policy against racial distinction and state action in implementation of that policy is permissible under the commerce clause, while state action

in derogation of that policy is a burden on interstate commerce and invalid.

Again, in passing on the contention of a labor union that the application of a state civil rights law prohibiting it from discriminating in membership in its organization on the basis of race was offensive to the Fourteenth Amendment, this Court held that the judicial determination sought "would be a distortion of policy manifested in that Amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94. This holding seems to indicate a national policy against discrimination on the basis of race and to render valid all state action in support of this policy.

b.

Where Federal Action Was Involved.

This Court has invalidated every restrictive action of the Federal Government which was based upon race or color alone when complained of by citizens of the United States with one exception, namely, in the *Japanese cases.*

It prohibited the racial distinctions complained of in *Henderson* v. *United States*, 339 U. S. 816, with respect to dining cars in use in interstate commerce.

It declared United States District Courts had no power in the District of Columbia to grant injunctions in aid of restrictive covenants based on race. *Hurd* v. *Hodge*, 334 U. S. 24.

In *Steele* v. *Louisville and Nashville R. R. Co.*, 323 U. S. 192, this Court, although not reaching the constitutional question raised, held that enforcement of a collective bargaining agreement discriminating against Negroes as to seniority rights would be enjoined. A more recent case went further. In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768, the Court held that collective bargaining agents cannot use their position and power to de-

stroy colored workers' jobs in order to give them to white workers. The Court thus invalidated attempts to disqualify colored workers for employment on the basis solely of their race or color.

This Court has upheld a departure from this policy in only one situation. The restrictions placed upon persons of Japanese origin on the West Coast during World War II were sustained in *Hirabayashi* v. *United States*, 320 U. S. 81, and in *Korematsu* v. *United States*, 323 U. S. 214, as emergency war measures taken by the national government in a dire national peril of the gravest nature. The military decision was upheld as an implied power under the War Power where the Court decided that it should not interfere with measures considered necessary to the safety of the nation by those primarily responsible for its security. Yet, in upholding these orders, the Court made some of the most sweeping condemnations of governmental action based upon race and color ever announced by our judiciary. And while departure from accepted standards of governmental conduct was sustained in order to remove persons of Japanese origin from areas where sabotage and espionage might have worked havoc with the national war effort, once this removal was accomplished and individual loyalty determined, further restrictions based upon race or color could no longer be countenanced. *Ex parte Endo*, 323 U. S. 283.

As a matter of fact in *Railroad Company* v. *Brown*, 17 Wall. 44, where Congress had granted a charter to Railroad Company in which it prohibited separate street cars for Negroes in the District of Columbia, and enacted a statute to the same effect, this Court upheld the validity of these limitations. This case, the first case involving segregation to reach this Court after the adoption of the Fourteenth Amendment, again is in line with our Federal policy against racial distinctions in the District of Columbia.

2.

The Acts of Congress Are Indicative of This Federal Policy.

Petitioners submit that in no instance has Congress conditioned the enjoyment of a federally created right on the race or color of citizens upon whom the right is conferred, and that in every instance in which Congress has made reference to race or color of citizens in its legislation the purpose of the reference has been to eliminate or diminish the effect of a real or threatened disability based upon race. It is axiomatic that since the time that Negroes became citizens of the United States Congress has repeatedly sought through the legislative power to achieve equality and eliminate inequality of all citizens without regard to race or color. A clear line of intent is seen from the enactment of the civil rights statutes shortly after the Civil War to the recent amendments to the National Labor Relations Act.

1. Emancipation of Slaves in the District of Columbia 1862. (Act of April 16, 1862, 12 Stat. 376, Chapter LIV, Section 1).

2. Removal of Black Codes in the District of Columbia in 1862. (*Ibid.*, Section 12).

3. The Bill of 1865 providing against separate street cars in the District of Columbia. Act of March 3, 1865, 13 Stat. 536, Section 5.

4. The Freedmen's Bureau Bill, Act of March 3, 1865, 13 Stat. 507, Ch. 90.

5. The Civil Rights Bill of 1866, Act of April 9, 1866, 14 Stat. 27.

6. The Equal Electors Law of 1869. Act of March 18, 1869, 16 Stat. 3, Chapter 3.

7. The Civil Rights Bill of 1871, Act of April 20, 1871, 17 Stat. 13.

8. The Civil Rights Act of 1875, Act of March 1, 1875, 18 Stat. 335.

9. The United Nations Charter. Chapter I, Article 1, Section 3, Chapter IX, Sections 55 and 56.

3.

THE LAWS OF THE LEGISLATIVE ASSEMBLY OF THE DISTRICT OF COLUMBIA ARE INDICATIVE OF THIS FEDERAL POLICY.

1. The Equal Service Law of 1872. Act of June 20, 1872, Comp. St. 1894, C. 16, Sec. 148 *et seq.*

2. The Equal Service Law of 1873. Act of June 26, 1873, Comp. St. 1894, C. 16, Sec. 151 *et seq.* (This statute was upheld in *District of Columbia* v. *John R. Thompson,* 73 Supreme Court 1007).

4.

THE ACTION OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT IS INDICATIVE OF THIS FEDERAL POLICY.

In recent years the President of the United States and his subordinates in the executive branch have come to exercise an increasing quantum of regulatory control over the conduct of citizens of the United States. There has arisen both by virtue of legislative delegation as well as executive initiative a great body of federal administration of important social and economic programs affecting the relationship between the citizen and the Federal Government. In the administration of these programs, care has been taken to see to it that enjoyment of the benefits of the programs would in no instance be conditioned upon the factors of race or color. Again it is submitted that there is no instance of federal action by the executive in which the enjoyment of a federally created right has been conditioned upon

the race or color of the citizen. Moreover, in areas peculiarly within the purview of the executive the following specific affirmative efforts have been made to eliminate such racial distinctions as are found to exist in the government-citizen relationship:

1. The President's Committee on Civil Rights.

Former President Harry S. Truman created a committee to determine to what extent law-enforcement measures may be strengthened and improved to safeguard the civil rights of the people, President's Committee on Civil Rights, Executive Order 9808, December 5, 1946. The report and recommendations of this committee dealt largely with the injustices and inequalities found in the economic, social and political life of Negroes. The Report of the President's Committee on Civil Rights, "To Secure These Rights." (GPO.: 1947), *passim.*

2. The President's Contract Compliance Order.

Executive Order 10210, Sect. 7, February 6, 1951, prohibited discrimination solely on the basis of race or color by an employer who obtains a government contract. Executive Order No. 10308, December 6, 1951, extended and improved this prohibition, and created a committee, composed of government officials, to ferret out and correct any breaches thereof. These Executive Orders were rescinded and replaced by Executive Order No. 10479, August 13, 1953, which provided that the Vice President of the United States be Chairman, and incorporated the substance of the two Executive Orders above-mentioned.

3. The President's Statement as to segregation in the District of Columbia.

President Eisenhower, in his State of the Union Message to the Congress, February 2, 1952, said that he will use the power of his office to wipe out segregation in the Nation's Capital.

4. The Ending of Segregation in all parks, playgrounds and restaurants operated by the Federal Government.

Numerous Federal Regulations prohibit segregation on the basis of race or color in all parks, playgrounds, and restaurants operated by the federal government, 36 C. F. R. 1.60, 12.7, 3.45 (1949 ed. and pocket Supplement); 14 C. F. R. 570.16 (1949 ed.).

5. The Ending of Segregation in the Armed Services.

Executive Order 9981, July 26, 1948, declared it to be the policy of the President that there be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.

6. Fair Employment Practice Order for Federal Government.

Executive Order 9980, July 26, 1948, commanded that all personnel actions taken by Federal appointing officers be based solely on merit and fitness; and that in all such actions there shall be no discrimination because of race or color. This Order is amplified by Executive Order No. 10479, *supra.*

7. The ending of segregation in Housing projects in the District of Columbia.

By resolution of the National Housing Authority June 4, 1953, the policy of segregation in Housing projects in the District of Columbia was abandoned.

8. District of Columbia Contract Compliance Order.

The District of Columbia Contract Compliance Order, G. F. 47-030, L. S. 6000-B, October 26, 1953, provides that no employer receiving a District of Columbia government contract shall discriminate against any citizen because of race or color in the execution of that contract.

B.

There Is No Statutory Authority for the Action of Respondents Complained of Here.

The statutes upon which respondents rely are as follows:

(a) *An Act to provide for the public instruction of Youth in Primary Schools throughout the County of Washington, in the District of Columbia, without the Limits of the Cities of Washington and Georgetown, May 20, 1862, 12, Stat. 394, Chapter 77, Sec. 35, which provides:*

> And be it further enacted, That the said levy court may in its discretion, and if it shall be deemed by said court best for the interest and welfare of the colored people residing in said County, levy an annual tax of one-eighth of one percent. on all the taxable property in said county outside the limits of the cities of Washington and Georgetown, owned by persons of color, for the purpose of initiating a system of education of colored children in said county, which tax shall be collected in the same manner as the tax named in section thirteen of this Act. And it shall be the duty of the trustees elected under section nine to provide suitable and convenient rooms for holding schools for colored children, to employ teachers therefor, and to appropriate the proceeds of said tax to the payment of teachers wages, rent of school rooms, fuel and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a full, equal and useful instruction of the colored children in said county. It shall be lawful for such trustees to impose a tax of not more than fifty cents per month on the parent or guardian of each child attending such schools, to be applied to the payment of the expenses of the school of which such child shall be an atetndant; and in the exercise of this power the trustees may, from time to time, discontinue the payment altogether, or may graduate the tax according to the ability of the child and the wants of the school. And said trustees are authorized to receive any donations or contributions that may be

made for the benefit of said schools by persons disposed to aid in the elevation of the colored population in the District of Columbia, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors, said trustees being required to account for all funds received by them, and to report to the commissioners in accordance with the provisions of section twenty-two of this Act.

(b) *An Act providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for other Purposes. May 21, 1862, 12 Stat. 407, Chapter 83:*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act it shall be the duty of the municipal authorities of the cities of Washington and Georgetown, in the District of Columbia, to set apart ten percentum of the amount received from taxes levied on the real and personal property in said cities owned by persons of color; which sum received for taxes, as aforesaid, shall be appropriated for the purpose of initiating a system of primary schools for the education of colored children residing in said cities.

Sec. 2. And be it further enacted, That the boards of trustees of public schools in said cities shall have sole control of the fund arising from the tax aforesaid, as well as from contributions by persons disposed to aid in the education of the colored race, or from any other source, which shall be kept as a fund distinct from the general school fund; and it is made their duty to provide suitable rooms and teachers for such a number of schools as, in their opinion, will best accommodate the colored children in the various portions of said cities.

Sec. 3. And be it further enacted, That the board of trustees aforesaid shall possess all the powers, exercise the same functions, and have the same supervision over the schools provided for in this act as are now exercised by them over the public schools now existing in said cities by virtue of the laws and ordinances of the Corporation thereof.

Sec. 4. And be it further enacted, That all persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject or amenable; that they shall be tried for any offenses against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted or any crime or offence against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this Act are hereby repealed.

(c) *An Act relating to Public Schools in the District of Columbia, July 23, 1866, 14 Stat. 216, Chapter 217, Sec. 1, which provides:*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the eighteenth section of the Act entitled "An act to provide for the public instruction of youth in the county of Washington, District of Columbia, and for other purposes", approved June twenty five, eighteen hundred and sixty-four, shall be so construed as to require the cities of Washington and Georgetown to pay over to the trustees of colored schools of said cities such a proportionate part of all moneys received or expended for school or educational purposes in said cities, bear to the whole number of children, white and colored, between the same ages. That the money shall be considered due and payable to said trustees on the first day of October of each year, and if not then paid over to them, interest at the rate of ten percentum per annum on the amount unpaid may be demanded and collected from the authorities of the delinquent city by said trustees.

(d) *An Act donating certain Lots in the City of Washington for Schools for Colored Children in the District of*

Columbia, July 28, 1866, 14 Stat. 343, Chapter 308 which provides:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of public buildings be, and is hereby authorized and required to grant and convey to the trustees of colored schools for the cities of Washington and Georgetown, in the District of Columbia, for the sole use of schools for colored children in said District of Columbia, all the right, title and interest of the United States in and to lots numbered one, two and eighteen in square nine hundred and eighty-five, in the said city of Washington, said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools, And wherever the same shall be converted to other uses they shall revert to the United States.

(e) *An Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1110, was R. S. D. C. Section 281) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI Section 17)] which provides:*

> *Education of colored children.* "It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children, between the ages of 6 and 17 years, to the payment of teachers' wages, to the building or renting of schoolrooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia."

(f) *Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316,*

Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1111, was R. S. D. C. Section 282) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 16)] which provides:

> *Placement of children in schools.* "Any white resident shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in the District of Columbia he or she may think proper to select, with the consent of the Board of Education; and any colored resident shall have the same right with respect to colored schools."

(g) *Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1109, was R. S. D. C. Section 283), (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 17)] which provides:*

> *Board of Education may accept and apply donations for colored schools—Accounting.* "The Board of Education is authorized to receive any donations or contributions that may be made for the benefit of the Schools for colored children by persons disposed to aid in the elevation of the colored population in the District, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors; the Board of Education to account for all funds so received."

(h) *Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1940, Sections 31-1112, was R. S. D. C. Section 306) (In substance—the Act of June 25, 1864, 13 Stat. 187, 191 Chapter CLVI, Section 18)] which provides:*

> "Proportionate amount of school moneys to be set apart for colored schools. It shall be the duty of the proper authorities of the District to set apart each year from the whole fund received from all sources by such authorities applicable to purposes of public education

in the District of Columbia, such a proportionate part of all moneys received or expended for school or educational purposes, including the cost of sites, buildings, improvements, furniture and books, and all other expenditures on account of schools, as the colored children between the ages of 6 and 17 years bear to the whole number of children, white and colored, between the same ages, for the purposes of establishing and sustaining public schools for the education of colored children; and such proportion shall be ascertained by the last reported census of the population made prior to such appointment, and shall be regulated at all times thereby."

(i) *Act of June 20, 1906, 34 Stat. 320, Chapter 3446, Section 7, as amended by Act of July 21, 1945, 59 Stat. 500, Chapter 321, Title V, Section 21 (effective July 1, 1945, now District of Columbia Code, 1951 Ed., Title 31, Section 115), which provides:*

Principals of schools—Duties. "Principals of normal, high and manual training schools shall each have entire control of his school, both executive and educational, subject only in authority to the superintendent of schools for the white schools and to the colored first assistant superintendent for the colored schools, to whom in each case he shall be directly responsible."

(j) *Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6 as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1113, was R. S. D. C. Section 310) (originally enacted May 26, 1862, 12 Stat. 407, Chapter 83, Section 2)] which provides:*

Facilities for educating colored children to be provided. "It is the duty of the Board of Education to provide suitable rooms and teachers for such a number of schools in the District of Columbia, as, in its opinion, will be accommodate the colored children in the District of Columbia."

(k) *Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session, District of Columbia Code, 1951 Ed., Title 31, Sections 669, 670, 671, which provides:*

Number of First Assistant Superintendents—Sphere of supervision—Duties. "There shall be two First Assistant Superintendents of Schools, one white First Assistant Superintendent for the white schools, who, under the direction of the Superintendent of Schools, shall have general supervision over the white schools; and one colored First Assistant Superintendent for the colored schools, who, under the direction of the Superintendent of Schools, shall have sole charge of all employees, classes and schools in which colored children are taught. The First Assistant Superintendents shall perform such other duties as may be prescribed by the Superintendent of Schools."

Board of examiners—Composition—Designation of members. "Boards of examiners for carrying out the provisions of the statutes with reference to examinations of teachers, shall consist of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the white schools for the white schools and of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the colored schools for the colored schools. The designations of members of the supervisory or teaching staff for membership on these boards shall be made annually by the Board of Education on the recommendation of the Superintendent of Schools."

Appointment of chief examiners—Compensation. "There shall be appointed by the Board of Education, on the recommendation of the Superintendent of Schools, a chief examiner for the Board of Examiners for white schools. An associate Superintendent in the colored schools shall be designated by the Superintendent of Schools as chief examiner for the board of examiners for the colored schools. All members of the respective boards of examiners shall serve without additional compensation."

It is quite clear from an examination of the above Acts of Congress that they possess no language of a mandatory character. The language is capable of an interpretation that it is a recognition by the Congress of the fact that separate private schools existed in the District long before public schools were supported by Congress. Only precise and concrete language requiring segregation of the races could overcome the historical fact that this language was approved by the Congress that opposed every type of racial distinction by Government.

The history as well as the language of these various Acts demonstrate an intention by the legislature at least to guarantee minimum opportunities to the colored children at a time when serious objections were made to any public education for them. Certainly there were those members of Congress who probably believed that for the newly freed Negro public education might best be secured in separate schools for an adjustment period. All that this means is that the legislature sought to give *recognition to voluntary separation.* It seems doubtful that this Court today would conclude that such a delegation of power by Congress would be constitutional even if such an intent be found to exist.

The problem posed in the Bolling case is whether this Court, as the final arbiter, believes that segregated education in the District of Columbia comports, in 1953, with the due process clause of the Fifth Amendment. We believe that respondents have erroneously concluded that "upon this point a page of history is worth a volume of logic." Mr. Justice Peckham cautioned against the danger of this approach when he said:

> "What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption

of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

"What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 318; *Dunlap* v. *United States*, 173 U.S. 65, 75.

"In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit." *Maxwell* v. *Dow*, 176 U.S. 581, 601, 602.

Hence, it is petitioners' position that neither the intent which may be inferred from a review of history, nor the action or inaction of Congress is controlling in this matter.

This Court as early as *Marbury* v. *Madison*, 1 Cranch (U.S.) 137, 177, 2 L. ed. 60, announced:

"It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act . . .

> It is, emphatically, the province and duty of the judicial department, to say what the law is"

This Court has stated that the Fifth Amendment is a limitation upon all three branches of the Federal Government, hence Congress could not make any process "due process". *Den ex dem. Murray* v. *Hoboken Land Improvement Co.*, 18 How. 272, 276, 15 L. Ed. 372. In *St. Joseph Stock Yard Co.* v. *U. S. et al.*, 298 U.S. 38, 51-52, Mr. Chief Justice Hughes, speaking for the Court, stated that the rate-making power of Congress was limited by the due process clause of the Fifth Amendment, so that when the legislature acted in that matter

> "its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

This Court in *Baltimore & Ohio R.R. Co.* v. *U.S.*, 298 U.S. 364, 56 S. Ct. 805, cited with approval the *Murray and St. Joseph Stock Yard Co.* cases, supra, when concluding that what constitutes due process of law is for judicial ascertainment. These petitioners' constitutional rights cannot be defeated by the existence or non-existence of legislation.

This Court in exercising its exclusive judicial function of determining whether respondents' actions are violative of the Fifth Amendment must decide whether racial classification in affording public education *today* satisfies due process. As Judge Edgerton, dissenting in *Carr* v. *Corning*, 86 U.S. App. D.C. 173, 182 F. 2d 14, 33 said:

> "When the Fifth Amendment was adopted Negroes in the District of Columbia were slaves, not entitled to unsegregated schooling or to any schooling. Con-

> gress may have been right in thinking Negroes were not entitled to unsegregated schooling when the Fourteenth Amendment was adopted. But the question what schooling was good enough to meet their constitutional rights 160 or 80 years ago is different from the question what schooling meets their rights now. 'It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights'." Citing *Wolf* v. *Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361.

The petitioners believe that the words of Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 442-443, are apropos to this court's present determination of whether respondents may make racial classifications *today* in affording public school education to these petitioners:

> "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.
>
> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the

provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a *constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407)—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' Id., p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland*, 252 U.S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago'."

Respondents can point to no law in the District of Columbia which would be violated by the admission of these minor petitioners to the Sousa Junior High School. In Ex Parte Endo, *supra*, this Court said at page 299-300:

"We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and

> members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Assuming that Congress has the power to compel segregation of American citizens in the Schools of the District of Columbia, though we deny that Congress has it, our present inquiry is, has Congress enacted any statute specifically granting such power to the District of Columbia School Board? In pursuing this inquiry, we are free of entangling juridical concepts which concern themselves with balancing the interests of the states with that of the Federal Government. This case presents a federal matter pure and simple. At the outset, it should be remembered that we are to be guided by the advice of this Court given in *Ex Parte Endo, supra,* namely, that when the Congress of the United States purports to place restraints on its citizens through Congressional enactments the language of those enactments must clearly and unmistakably indicate both the intended extent and scope of such restraints and clearly define the authority granted to the agency which is to administer the Act. See also *Steele* v. *Louisville & Nashville Ry. Co., supra.* Moreover, when as in this case these restraints involve odious distinctions between citizens because of their race, (*Hirabayashi* v. *U. S.,* 320 U. S. 81, 100) we think this Court should demand and require that respondents point out the specific language, *in haec verba,* in which it is asserted that Congress has granted this power of racial segregation. If this Court should do so, it would place no unreasonable burden upon the legislature. As a general rule when legislatures have intended to compel the separation of races in public schools they have done so with simple, easily found, and easily understood words, combining these words into language which none who read could doubt.

An inspection of the constitutions and laws of the states where segregation by law is in vogue demonstrates the proposition that where the law-making body intended a compulsory segregated educational pattern it expressly and clearly said so. As early as 1875 the Constitution of Alabama contained the following phrase: "But separate schools shall be provided for the children of the citizens of African descent." Alabama Const. 1875, Article XII, Section 1. It now provides, in its Constitution of 1901, that "no child of either race shall be permitted to attend a school of the other race." Alabama Const. 1901, Article XIV, Section 256. In Arkansas a statute charges the school directors in each district with the duty to establish separate schools for white and colored persons. Acts 1931, No. 169, Sec. 97, P. 476; Popes Dig. Sec. 11535. Delaware provides, "and separate schools for white and colored children shall be maintained." Delaware Const. 1897, Article X, Section 2. The Florida Constitution of 1885 commands that "White and colored children shall not be taught in the same school." Florida Const. 1885, Art. XII, Sec. 12. As early as 1877, the Constitution of Georgia read, "but separate schools shall be provided for white and colored races." Georgia Const. 1877, Art. VIII, Sec. 1. There has to date been no change in this requirement. Kentucky's Constitution of 1890 says, "Separate schools for white and colored children shall be maintained." Ky. Const. 1890, Sec. 187. That is the law of Kentucky today. Louisiana's Constitution of 1898 provides for "free public schools for the white and colored races separately established." La. Const. 1898, Art. 245. That "separate public schools shall be maintained for the education of white and colored children" is still the dictate of its present Constitution. La. Const. 1921, Art. 12, Sec. 1. The Mississippi Constitution of 1890 declares that "separate schools shall be maintained for children of the white and colored races." Miss. Const. 1890, Sec. 207. "Separate free public schools shall be established for the education of children of African descent."

Mo. Const. 1875, Laws, 1945 P. 50. North Carolina—"And the children of the white race and the children of the colored race shall be taught in separate public schools." N. C. Const. 1876, Art. IX, Sec. 2. Oklahoma provides: "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained." (Const. 1907, as amended Stat. 1931, 13676). Constitution Art. XIII, Sec. 3. The statutes of Oklahoma further provide: "The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the colored and white races, with impartial facilities for both races." (Laws 1949, P. 536, Art. 5, Sec. 1) Statutes, Supplement 1949, Art. 5, Title 70, Sec. 5-1).

The 1895 Constitution of South Carolina states, "separate schools shall be provided for children of the white and colored races and no child shall ever be permitted to attend the school provided for children of the other race." S. C. Const. 1895, Art. XIM, Sec. 7. Tennessee's Constitution of 1870 provides: "No school . . . shall allow white and Negro children to be received as scholars together in the same school." Tenn. Const. 1870, Art. XI, Sec. 12. Texas' Constitution of 1876 puts it thusly—"Separate schools shall be provided for white and colored children." Texas Const. 1876, Art. VII, Sec. 7. Virginia's 1902 Constitution says, "white and colored children shall not be taught in the same school." Va. Const. 1902, Art. IX, Sec. 140. Similarly, West Virginia as long ago as 1872, wrote into its Constitution that—"White and colored persons shall not be taught in the same school." W. Va. Const. 1872, Art. XIII, Sec. 8. The only exception to this use of mandatory language in the laws of the group of states where segregation is institutionalized is Maryland. In Maryland the language of the statutes is similar to the language used in the Acts of Congress, *supra*. Maryland laws provide: (a) "All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State . . ." An. Code Md. 1939, Art. 77, Sec. 111. (b) "it

shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths between six and twenty-one years of age . . ." An. Code Md. 1939, Art. 77, Sec. 192. In other sections (193, 194, 195), provisions are made for administering "colored schools." Section 203 provides for colored industrial schools; Section 252, for a colored normal school for teachers. The compelling language used by the other southern states is absent. We request this Court to take judicial notice of the fact that under these statutes the Board of School Commissioners by a vote of 5 to 3 authorized the admission of a Negro student the last term to the white Polytechnic Institute of Baltimore, Maryland, without a law suit or legislative action. Admittedly, they did this because no similar provisions were available for Negroes, but likewise it is clear that they did not consider these Maryland laws any bar to their administrative action.

Thus, it appears that in the only one of these states where the laws are similar to those in the District of Columbia the language used there is not interpreted by school officials as compelling segregation.

In the District of Columbia no act of Congress attains the reach of the statutes just enumerated. Among the statutes of the District of Columbia there is none which requires or authorizes the exclusion of any Negro child from any school solely on the basis of race or color.

On April 16, 1862, slavery was abolished in the District of Columbia, 12 Stat. 376, Chapter LIV, Section 1. By virtue of Section 12 of the same act of the "black codes" of Maryland and Virginia were rendered inoperative in the District. Approximately one month later on May 21, 1862, effect was given to the Act of Congress, 12 Stat. 407, Chapter 83, which, *inter alia*, did two things: First, it undertook to give to Negroes at least some measure of participation in such public school educational opportunities as were then extant. And it is of utmost importance to remember that at that time public school education, *qua* public school edu-

cation, was not universally accepted and was in an undeveloped, rudimentary condition. Secondly, this statute (section 4) struck down any vestiges of the black codes that may have been deemed to have survived the thrust and reach of the Act of April 16, 1862. Again it must be remembered that Congress paused in the midst of its war efforts to give some attention to education for the Negro—not addressing itself to the question of segregation at all, but merely to the problem of some education for the Negro.

Against this backdrop of social and political fabric, and without more, it seems to us to be clear that in this early period Congress not only did not issue respondents a grant of power to compel segregation in the schools of the District of Columbia, but did not even consider the matter. But there is more to be considered.

The Acts of 1862 merely provided that a special tax might be levied upon property "owned by persons of color, for the purpose of initiating a system of schools for colored children." Two years later in 1864 when a comprehensive statute of public schools was enacted which for the first time made attendance at school for District children compulsory it contained no express pronouncement that white and colored children shall not be educated together or that the school managers could compel a Negro child to attend a "Negro school." Congress wrote "it shall be the duty of the school board to provide suitable and convenient houses or rooms for holding schools for colored children." The Act further provided—"Any white resident shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in said portion of the District he or she may think proper to elect, with the consent of the school board; and any colored resident shall have the same rights with respect to colored schools." Patently this language is pitched in terms of privilege and of "may". These are not words of compulsion to attend segregated school facilities. Furthermore, this language of privilege was addressed to choices

of whites for white schools and Negroes for Negro schools and made no reference to choice of Negroes or whites for mixed schools. It is apparent that facing an existing situation of schools being operated by charity and philanthropy Congress desired that Negroes should also benefit from any publicly appropriated funds. A search of the subsequent statutes on public education in the District of Columbia reveals no language, sounding in restraint of the citizenry, which rises above that just quoted, and upon which it appears subsequent statutes are bottomed. Our position bluntly stated is that such language does not in clear and unmistakable terms grant to the school board the power to compel Negro children and white children to be educated separately.

At most they can be said only to permit a voluntary segregation of the Pupils on the Basis of Race.

Asserting as we do that the education statutes do not compel segregation the most that we concede is that they permit a voluntary separation of races. The contemporaneous expressions of members of Congress in the decade beginning with the close of the Civil War add strong support for the assertion here made. This is so, not so much because of what was said by individual Senators and Congressmen for and against "mixed schools", but for the reason that the conflicting opinions on the subject at times apparently slanted in an effort to secure or prevent, as the case might be, passage of legislation designed to guarantee to the newly freed slaves a status commensurate with their new freedom, demonstrated that there was in fact no crystallyzed intent to compel segregated schools. In fact some Congressmen felt Negroes and whites could go to school together in the District. Speaking of the Civil Rights Act of 1875, which he supported, Senator Pratt of Indiana observed that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where they were very few

colored students, they would have to be intermingled.[1] We think Senator Frelinghuysen's statement should be taken as indicative of the most distant point on the road toward a concept of segregation in schools generally which the Congress as a Congress actually reached. On April 29, 1874, in making a speech to explain the bill denominated S. No. 1 (a Civil Rights Bill) Senator Frelinghuysen said:

> "When in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so . . . I believe that this vountary division into separate schools would often be the solution of the difficulty in communities where there still lingers a prejudice," Cong. Rec., 43rd Congress, 1st Sess. p. 3451.

Again in regard to segregated schools as a generic proposition, it is significant, we think, to note the action of Representative Hereford of West Virginia taken by him on March 11, 1872, and the reaction of the House of Representatives to it. On that day Representative Hereford asked for unanimous consent to submit the following resolution:

> "Whereas it is one of the fundamental principles of our form of government that Governments derive their just powers from the consent of the governed: Therefore,
>
> Be It Resolved, That it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the states, and equally unconstitutional and tyrannical for Congress to pass any law interfering with churches, public carriers, or innkeepers, such subjects of legislation belonging of right to the states respectively."

Upon objection by Congressman Pierce, Congressman Hereford moved that the rules be suspended and the resolution adopted. His motion was voted down.

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[1] From a speech of Senator Pratt, 2 Cong. Rec. 3432, 43 Cong. 1st Sess.

Turning again to the local scene as historically laid in the formative and fundamental period from 1805 to 1875 we see that the colored children of the District of Columbia were not included among the beneficiaries of public schools in any legislation either by the Congress or the City Council prior to the abolition of slavery in the District of Columbia, April 16, 1862. Wilson, J. Ormond, "Eighty Years of the Public Schools of Washington—1805 to 1885", *Records of the Columbia Historical Society, Vol. 1,* pp. 119-122. The National Government gave nothing for the maintenance of schools in the District until 1878; the support was derived from the people of the District by gifts and taxation and the revenue from lotteries. *Report of the Board of Education to the Commissioner of the District of Columbia,* 1904-1905, p. 56. As to the public education for the benefit of whites it has been said that up to 1844, "The city authorities had not yet come to realize the necessity of a free public school system for all children, and the free schools were in reality charity schools . . . " Dodd, *Government of the District of Columbia* (Byrne & Co. 1909) p. 226. A public school system free to all pupils was not established until 1848, when all tuition requirements were abolished. *Ibid* at p. 226. Annual taxes were first imposed in 1848, *Ibid,* p. 226.

Public education in the District of Columbia was in this embryonic stage of development when slavery was abolished here in 1862.

However since 1807, there had been schools receiving Negro pupils, a number of which schools were mixed. *Special report of the Commissioner of Education on the Conditions and Improvement of Public Schools in the District of Columbia* (GPO: 1871), p. 222; Dabney, pp. 1-22.

Of course, these schools were supported privately. The school legislation of 1862, 1864 and 1868 merely amounted to the giving of some public aid to this then existing system of private education of colored people, *Special Report, supra,* pp. 252-254. Again, we point out, no intent to compel segregation is evident.

The first public school for colored was not opened until March 1864, and it was opened in a private church. The first publicly owned school house for colored was not acquired until 1865, and was only made possible by private philanthropy, *Special Report, supra,* 254. This no doubt is the genesis of the statutory provision authorizing the school officials to receive donations for colored schools, while nothing is said about donations as to white schools. The various aid societies provided, by and large, the teachers and equipment for the schools, later operated by the Board of Trustees for colored schools.

> "These schools, which began in the Ebenezer church in a single room, with two teachers, in March, 1864, and in the spring of 1865 moved into the first school house built for public schools in the District, were increased by the Aid societies to four schools and as many teachers in 1866, and to five schools with seven teachers of the last named year, the Trustees commenced their school year with 31 teachers, four more being soon added, making for nearly the whole of that year 35 teachers, while through the winter and spring months the number was 41, the Aid societies furnishing at the same time 28, making a total of 69 teachers." Special Report, supra, p. 254.

In addition the management and control of these publicly supported schools, unlike the other public schools placed under the management of the local municipal governing bodies, were placed under the Secretary of the Interior, Act of July 11, 1862, 12 Stat. 537, Chap. 151.

The fact that there was in existence a public school system operated, maintained and controlled by the local municipal government, to which white pupils were admitted while there was this essentially philanthropic arrangement by the federal government for colored pupils, no doubt served as the basis for the general public and private confusion and doubt as to whether Negroes were or were not entitled to be accommodated in the same local public schools to which whites were admitted.

Indeed indecision is the hallmark of this matter and we submit that authority here claimed does not measure up to the test of clear and unmistakable delegation of power of restraint required by *Ex Parte Endo, supra.* Proceeding to a more intimate view of actual conduct, we find that in November of 1869 a Negro pupil, the daughter of the Reverend Mr. Stella Martin, a Negro minister, prominent in the public education movement, was admitted to a "white" school, *Daily Morning Chronicle,* Friday, November 6, 1869. This action admitting the Martin girl to the white school was challenged and a ruling requested from the corporation counsel's office as to the legality of the action. The Office of the corporation counsel sustained the right of this colored child to remain in the "white" school, *Daily Morning Chronicle,* December 1, 1869.[2]

In the latter part of 1869 and in 1870 resolutions were submitted to the Board of Aldermen and to the Board of Common Council of Washington seeking to have the "Board of Trustees of Public Schools" make no distinction on account of "race or color" in the admission of children to the schools under their jurisdiction.[3] And on April 25,

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2 Quoting from Opinion of William E. Cook, Attorney for City of Washington:

"Obviously, the rule makes the judgment of a single trustee, and not the views or avowals of a parent or of any other person, conclusive as to the suitableness of a candidate; and if that judgment correct or erroneous, is favorable to the applicant, a ticket must be granted. It cannot be withheld; and when it is issued the holder, not ex gratia, but dejure, may demand admission to the school designated in it.

Hence, when the child referred to by you was furnished, by "one of your number," with a ticket in the usual form, or in accordance with the cited rule, its qualifications as to a scholar were regularly and definitely determined, and, on presenting the ticket in its possession to the teacher to whom it was addressed, eo instanti, it became entitled to admission into "her school." The teacher could not reject or repel the child, or refuse to receive and consider it as a scholar. And neither the laws of Congress, nor the ordinances of the city, nor the "by-laws" of the Board of Trustees authorize or permit it to be classified as a "visitor", or to be temporarily suspended, or to be deprived in these modes of the rights and privileges conferred on it by the ticket of admission. Unless, therefore, the child is expelled from the school for a violation of existing rules or regulations, or removed from it by paramount legal authority, if any exists, it must be allowed to remain as a pupil and in all respects be regarded and treated as such."

3 Resolution of Mr. Moore, a member of the Board of Alderman, Journal of the 67th Council pp. 828-829. Resolution of Mr. Hatton, Member of the Board of Common Council, March 14, 1870.

1870, a joint resolution of the Board of Common Council of Washington, unanimously passed, memorialized Congress to reorganize the public schools in the District of Columbia and to give the District "one common school system in which all children can be educated regardless of their color, to be governed by one Board of Trustees."[4] The Board of Common Council was likewise memorialized to strike the word "white" wherever it occurred in the Act of November 12, 1858, or in any other laws relating to the public schools of the City of Washington (Journal of the 67th Council pp. 1474-1475).[5]

We submit that this contemporaneous construction of the powers of the school managers in terms of actual conduct and the efforts made to have a clear cut Congressional pronouncement of a common education system are of extreme significance in deciding whether or not integrated schools were interdicted by Congress. It is submitted that this doubt still exists today for the reason that Congress has taken no specific action since that time to resolve the existing doubt, inherent in the language of these Acts and embedded in this historical background.

Finally when it is considered that it is the Congress of the United States whose intentions we are considering—a Congress which has since 1860 (omitting the educational statutes)[6] enacted no law conditioning the enjoyment of a right in the District of Columbia solely on the basis of race or color, but on the contrary has in every law since that date acted in aid of removal of such racial distinctions in the realm of governmental action in the District of Columbia, it would appear to be an irresistible conclusion

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[4] Piper resolution, Board of Common Council of Washington, April 25, 1870. (Mr. Hatton's amendment to this resolution was rejected; it provided that the children of African descent be removed from the public schools until Congress shall have complied with the resolution.)

[5] Negro member of the Board of Trustees of the Public Schools, Vashon resolution, Journal of the 67th Council, p. 1488.

[6] But see National Training School for Girls Act, Act of February 28, 1923, 42 Stat. 1358, Ch. 148, Sect. 1, March 16, 1926, 44 Stat. 208, Ch. 58, D. C. Code 1951 Ed. Title 32, Sect. 906.

that Congress did not intend in this one area of education alone to compel racial distinctions.

C.

An Interpretation by This Court That These Acts of Congress Compel the Segregation of Pupils in the District of Columbia Solely on the Basis of Race or Color Alone Would Render Them Unconstitutional (Answer to Question 3 of the Court).

1.

SUCH AN INTERPRETATION WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

a.

This Is a Case of First Impression in This Court.

The question which the instant case raises, whether the Federal Government in providing educational opportunities for pupils in the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely by the basis of race or color, has never been presented to this Court before. The United States Court of Appeals for the District of Columbia Circuit had this question presented to it in only one other case, *Carr v. Corning, supra,* and that court there decided that these Acts of Congress, *supra,* compelled segregation in the District of Columbia and that compulsory separation of races in public education was constitutional. The court below relied upon the holding in the *Carr* case in dismissing petitioners' complaint.

The United States Court of Appeals for the District of Columbia Circuit has had before it only three cases dealing with the question of race distinctions in the provisions for opportunities for public education in the District of Columbia. The first case was *Wall* v. *Oyster,* 36 App. D. C. 50 (1910). In that case, petitioner, a resident of the District of Columbia of school age, questioned her classification as

a Negro for purposes of assignment to a particular school. The court, in deciding that question, stated that compulsory segregation of the races was constitutional in the District of Columbia. Petitioner having conceded that point, and having based her case upon a lack of standards for the determination of race, and upon a failure to provide a hearing upon this determination, the issue before the court was whether or not proper standards had been set and a proper hearing provided for. There was no issue before the court as to whether or not the government possesed the power to make the classification. Therefore, that decision is of little value in determining the question posed in the instant case and was not relied upon by the Court of Appeals in the *Carr* case for this purpose.

The Court of Appeals for the District of Columbia Circuit first faced the question of the power of the Federal Government to segregate Negroes from whites in providing opportunities for public education in the District of Columbia in *Carr* v. *Corning*, and *Browne* v. *Magdeburger*, *supra*.

The court consolidated for argument and decision these two cases. The *Browne* complaint did not present the question of the constitutionality of the separation of the races in public education; however, the *Carr* complaint did. The Court of Appeals held, at page 175:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did."

The court concluded on this point that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 did not mean to prohibit the legislature from providing separate schools. The court examined the chronology of statutes relating to the separate school sys-

tem in the District of Columbia and concluded that the framers of the Fourteenth Amendment intended to provide separate school facilities for the races in the District of Columbia.

Petitioners have already shown why they do not agree with the opinion of the court below that these Acts of Congress, *supra,* compel segregation. But, even if petitioners are wrong and, these Acts of Congress do compel segregation, these Acts are unconstitutional and the *Carr* case was wrongly decided. The majority failed to meet and deal with the fundamental question raised by Judge Edgerton's dissent. It is submitted that before any reliance can be placed upon the conclusion reached by the majority in the *Carr* case the following argument of Judge Edgerton at page 192 must first be answered—

> "Appellees say that Congress requires them to maintain segregation. The President's Committee concluded that congressional legislation 'assumes the fact of segregation but nowhere makes it mandatory'. I think the question irrelevant, since legislation cannot affect appellant's constitutional rights."

The Court of Appeals was so preoccupied in the *Carr* case with the history and background of the Fourteenth Amendment, and with the legal theories underlying the separate but equal doctrine, and was so convinced by the record in which the lower court had found evidence showing equality of facilities, that its opinion that the action of the School Board was constitutional is of doubtful value in the instant case. Here the sole question is as to the constitutional power of the school officials to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color. Here there is no question of equality of facilities. This view is supported by the opinion of the Court of Appeals, especially where it is observed that Judge Clark concurred in the majority opinion although he considered the cases moot and to have been properly dismissed, since the factual basis for the actions

was the double shift at Browne Junior High School at the time the actions were brought, and since the double shift had been eliminated prior to the action.

Therefore, whichever interpretation is placed upon these Acts of Congress, respondents are still limited in their power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color by the Constitution and laws of the United States, which limitations should be determined by this Court.

b.

Respondents' Actions in Regulating and Administering the Educational System of the District of Columbia Pursuant to and Under Color of Congressional Authority Are Limited by the Provisions of the Due Process Clause of the Fifth Amendment.

Article I, Section 8, Clause 17, of the Constitution of the United States grants to Congress the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. Pursuant to this power, Congress by legislation has provided a system of education for the District of Columbia and acting pursuant to and under color of this legislation respondents regulate and administer said system of education. Congressional legislation providing the system of education and the acts of respondents in regulating and administering the educational system of the District of Columbia, beyond question, are subject to the limitations of the due process clause of the Fifth Amendment. In *Capital Traction Company* v. *Hof*, 174 U. S. 1, 5 (1899) this Court observed:

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of

a State might exercise within the State; . . . so long as it does not contravene any provision of the Constitution of the United States."

In *Callen* v. *Wilson*, 127 U. S. 540, 550 (1888), this Court observed:

". . . There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property . . ."

One of the constitutional guarantees, the benefit of which petitioners may not lawfully be deprived, is that as citizens no distinctions be made between them and other citizens because of race or color alone.

This Court, in *Hirabayashi* v. *United States*, 320 U. S. 81, 100, (1943) said:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection . . ."

In that same case, in a concurring opinion where this Court upheld the deprivation of the liberty of 70,000 Japanese under a war-time curfew law, Mr. Justice Murphy said at page 111:

". . . The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

"Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action

> to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments . . ."

Another constitutional guarantee, of which minor petitioners may not lawfully be deprived, is the right to go to Sousa Junior High School without any limitations based solely upon race or color.

Mr. Justice Murphy, in a concurring opinion in *Ex Parte Endo*, 323 U. S. 283, 308 (1944), said:

> ". . . For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction."

In the instant case minor petitioners would have a right to go to Sousa Junior High School but for respondents' action in excluding them solely because of their race or color, an action forbidden by the due process clause of the Fifth Amendment.

Final determination of what constitutes due process of law is for the judiciary, not Congress. *Baltimore & Ohio R. R. Co.* v. *U. S.* 298 U. S. 349, 364, 5, 7 (1938).

c.

Fundamental Rights With Respect to Education Are Protected by the Fifth Amendment Against Arbitrary Governmental Restrictions.

The right of a parent to direct the education of his child is a fundamental right firmly embedded in American jurisprudence. This Court has recognized that this right includes liberty of choice of parents and their children in the selection of the type of education which *parents* and *their children* think important. *Farrington* v. *Tokushige*, 273 U. S. 284 (1926); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1924); *Meyer* v. *Nebraska*, 262 U. S. 390 (1922).

This Court, in the cases above cited, has affirmed that educational rights of parents and their children, including their liberty of choice, are protected by the Federal Constitution from arbitrary governmental restrictions.

This Court held in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400 (1923), that:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to *acquire useful knowledge,* to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (Emphasis supplied)

Again in *Meyer* v. *Nebraska, supra,* at page 400, this Court stated:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, . . . enforce this obligation by compulsory laws."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-5 (1925), this Court held:

> "Under the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Meyer v. *Nebraska* and *Pierce* v. *Society of Sisters* involved the protection given to educational rights by the Fourteenth Amendment against unreasonable or arbitrary State restrictions. It is clear, however, that these rights are similarly protected by the Fifth Amendment from unreasonable or arbitrary Federal restrictions.

In *Farrington* v. *Tokushige*, 273 U. S. 284, 298, 299 (1927), this Court said:

> "Enforcement of the Act probably would destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue. . . . "The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents, and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, . . . Bartels v. Iowa, . . . Pierce v. Society of Sisters . . . While that amendment declares that no State shall 'deprive any person of life, liberty, or property, without due process of law,' the inhibition of the Fifth Amend-

ment—'no person shall . . . be deprived of life, liberty, or property, without due process of law'—applies to the federal government and agencies set up by Congress . . . Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Courts have indicated a respect for opinion of legal scholars and teachers: See: *Georgetown College* v. *Hughes*, 130 F. (2d) 810 (1942). With this in mind, petitioners call attention of the Court to the brief of the Committee of law professors, at pages 36-38, filed as Brief, Amicus Curiae in the Supreme Court of the United States, *Sweatt* v. *Painter, et al.*, No. 44, October Term, 1949, from which we quote in part:

"(1) A democratic society, like any other, seeks to transmit its cultural heritage, traditions and aspirations from generation to generation. While there are many instruments of transmission of culture—the family, the church, business, institutions, political and social groups and the schools—in our society the school seems to have emerged as the most important . . .

"(2) Just as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal. If children have race superiority taught them as infants, we cannot expect them lightly to toss it aside in later life. The answer lies not, however, in simply indoctrinating them with the principle of racial equality. . . . 'Education in America must be education for democracy. If education is life and growth, then it must be life within a social group. . . . Schools must be democratic communities wherein children live natural, democratic lives with their companions and grow into adulthood with good citizenship a part of their experience.'

"(3) This modern educational theory of learning by doing, clearly implies the necessity of non-segregated education. The principle of equality of opportunity regardless of race or creed, so much a part of our American tradition, can be fully achieved only if this element in our cultural heritage is kept alive and allowed to grow. The school, as has been shown, is the most important institution through which this heritage can be transmitted. But, as has likewise been made clear, proper teaching of the principle of equality of opportunity requires more than mere inculcation of the democratic ideal. What is essential is the opportunity at least in the school, to practice it. This requires that the school make possible continuous actual experience of harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life. In the segregated school, this desirable environment does not exist. The most important instrument for teaching democracy to all people is thus rendered impotent."

Educational rights are not immune from all governmental interference, but it is submitted that the educational rights asserted by Petitioners have been judicially determined to be fundamental rights. As such, every governmental interference with, or restriction upon them, when properly challenged as arbitrary, must affirmatively be shown to be reasonable, otherwise they violate the due process clause of the Fifth Amendment. The relevant decisions of this Court demonstrate that when governmental interference with fundamental educational rights and liberties are challenged as arbitrary, the burden is cast upon the government imposing the restrictions to demonstrate the reasonableness of the restrictions.

Farrington v. *Tokushige, supra,* involved an Act of the legislature of Hawaii which was challenged as violative of the due process clause of the Fifth Amendment. The Act imposed severe limitations on the operation of so-called "foreign language schools" in Hawaii, and in this Court's

judgment, denied to parents "reasonable choice and discretion in respect of teachers, curriculum and textbooks", and deprived "parents of fair opportunity to procure for their children instruction which they think important." This Court did not hold that private-supported schools are not subject to government regulation, but it did hold that regulations restricting educational rights and liberties of parents and pupils must be justified as reasonable. The challenged regulation was held to violate the due process clause of the Fifth Amendment, because it restricted liberty of choice with respect to education without adequate reason. The government's contention that the regulations were "necessary for the public welfare" was not an adequate reason.

In *Farrington* v. *Tokushige, supra,* this Court made express reference to "the general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendanc upon schools" as announced in *Meyer* v. *Nebraska, supra,* and *Pierce* v. *Society of Sisters, supra,* and expressly held that this general doctrine is to be applied to educational rights protected by the Fifth Amendment, against arbitrary federal action.

This general doctrine touching educational rights protected by the due process clauses of the Fifth, and also the Fourteenth Amendments, is revealed by an examination of this Court's unanimous opinions in the cases relied upon.

The cornerstone of this doctrine is revealed to be the fundamental and, therefore, constitutionally protected right and duty of parents to direct and control the upbringing and education of their children. This right includes not only the right of pupils to "acquire useful knowledge". (*Meyer* v. *Nebraska, supra,* at page 399) but the parents' liberty of choice as to the type of school, selection of courses, and teachers. (*Meyer* v. *Nebraska, supra,* at pages 400-401; *Pierce* v. *Society of Sisters, supra,* at page 535; *Farrington* v. *Tokushige, supra,* at page 298).

The doctrine protects the rights thus described and defined, including liberty of choice, against *all* arbitrary governmental restrictions. (*Meyer* v. *Nebraska, supra,* at page 401; *Pierce* v. *Society of Sisters, supra,* at page 535). These educational rights are protected against arbitrary restrictions imposed "under the guise of protecting the public interest." (*Meyer* v. *Nebraska, supra,* at page 400).

The doctrine recognizes that whenever a governmental restriction is properly challenged as arbitrary, "determination by the legislature as to what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts." (*Meyer* v. *Nebraska, supra,* at page 400); and the burden is cast upon the government imposing the restriction, to demonstrate that there is "adequate reason" for the challenged restriction (*Farrington* v. *Tokushige, supra,* at page 298; *Pierce* v. *Society of Sisters, supra,* at page 534; *Meyer* v. *Nebraska, supra,* at page 402). Moreover, the challenged restriction must be shown to be reasonably related to a purpose within the competency of the government. (*Meyer* v. *Nebraska, supra,* at page 403; *Pierce* v. *Society of Sisters, supra,* at page 535).

Governmental action restricting educational rights and liberties by prescribed courses of instruction, to be justified, must be shown to be reasonably related to the promotion of the intelligence of the body politic. In *Meyer* v. *Nebraska, supra,* this Court held that a statute prohibiting the teaching of "any language other than the English Language" to pupils below the eighth grade, unreasonably restricted educational liberties protected by due process. The statute was not justified, because its purpose was to *prevent* the acquisition of knowledge of foreign language rather than to *promote* intelligence—thus an unauthorized purpose. In addition, this Court held that the restriction was "without reasonable relation to *any* end within the competency of the State." (Emphasis supplied).

It is generally agreed that the promotion of the general intelligence of the body politic is so essential to the de-

velopment and progress and even the very existence of democratic government, that education is a proper governmental function. To that end the states and the federal government have established and maintain systems of public education. In addition, the Federal Government and the states may make the education of children compulsory. Such a limitation on the fundamental educational right to liberty of choice must be justified, and is justified by showing that it is within the competency of the Government to require a parent to perform the duty he owes to his child and to his government, to educate his child.

However, compulsory attendance laws may not arbitrarily restrict liberty of choice as to schools. In *Pierce* v. *Society of Sisters, supra,* this Court held violative of due process a statute which compelled every child, for a prescribed period, to attend the public schools exclusively. This Court concluded that the purpose of the challenged statute was the standardization of children "by forcing them to accept instruction from public teachers only". Such a purpose was held to be excluded by the "fundamental theory of liberty upon which all governments in this Union repose". This Court again pointed out that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

In *Board of Education* v. *Barnette,* 319 U. S. 624 (1943) this Court enjoined the enforcement of a state law compelling patriotic observance on the part of public school pupils. In that case a majority of this Court held that the purpose of this restriction on educational rights, was to compel the flag salute and pledge of allegiance, and that such a purpose was beyond the competency of Government. The *Barnette* decision overruled the earlier decision of this Court in *Minersville School District* v. *Gobitis,* 310 U. S. 586 (1940) which held, among other things, that "promotion of national cohesion" was a lawful governmental purpose and that compelling public school pupils to salute the flag was reasonably related to this lawful purpose.

In *Zucht* v. *King*, 260 U. S. 174 (1922), a city ordinance making vaccination a prerequisite to school attendance was challenged as violative of due process. This Court upheld the ordinance; such a restriction on educational rights is justified both because the preservation of public health is recognized as an "adequate reason", and because making vaccination a prerequisite to school attendance is reasonably related to the preservation of public health.[6a]

d.

Governmental Restrictions Based on Race or Color Alone, Are Presumptively Arbitrary.

This Court said, speaking through Mr. Justice Black in *Korematsu* v. *U. S.*, 323 U. S. 214, 216, (1944)—

> "*It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.* That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. *Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.*" (Emphasis supplied.)

That "pressing public necessity" must be more than the possibility of racial conflicts resulting from racial antagonism alone, is made clear in this Court's opinion in *Ex Parte Endo, supra,* at pages 302-303 wherein this Court points out that no authority existed for the detention of an admittedly loyal citizen of Japanese ancestry simply because of "community hostility." This court said:

> "Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is

[6a] School regulations relating to scholarship and fitness of applicants, residence, age, sex, textbooks and courses of study, transportation, membership in fraternities and sororities, may restrict educational rights. Where such regulations are reasonably related to a recognized educational purpose or some purpose within the competency of the government responsible for such regulations, they have been upheld by the courts.

> to be sought on that ground, the Act . . . and Executive Order offer no support. And none other is advanced."

In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), this Court invalidated a city ordinance requiring residential segregation. To the contention that the ordinance was for the promotion of public peace by preventing race conflicts; the Court said:

> "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 245 U. S. 60, 81.

In *Hirabayashi* v. *United States, supra, Korematsu* v. *United States, supra,* and *Ex Parte Endo, supra,* this Court has evolved certain definite standards by which government enforced racial distinctions between citizens must be tested when properly challenged as violative of the due process clause of the Fifth Amendment. These standards are in accord with the earlier decisions of this Court in *Meyer* v. *Nebraska, supra, Pierce* v. *Society of Sisters, supra,* and *Farrington* v. *Tôkushige, supra,* in which restrictions on educational rights were struck down as arbitrary and therefore violative of due process.

1. *The restrictions must be justified by an affirmative showing of peculiar circumstances, present emergency, or pressing public necessity.*

(a) In *Meyer* v. *Nebraska, supra,* this Court invalidated a Nebraska statute restricting the teaching of foreign languages, as infringing educational rights protected by the due process clause of the Fourteenth Amendment. At page 402 the Court said:

> "The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown."

(b) In *Farrington* v. *Tokushige, supra,* this Court invalidated an Act of the Legislature of Hawaii restricting the operation of foreign language schools, as infringing educational rights protected by the due process clause of the Fifth Amendment. At page 298, this Court said:

> "Apparently all are parts of a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason."

In *Hirabayashi* v. *U. S., supra,* this Court upheld a military order confining Japanese-Americans to their homes at night as not infringing on the liberty of persons protected by the due process clause of the Fifth Amendment. At page 101, this Court said:

> "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew."

Again at page 108, Mr. Justice Douglas concurring said:

> "Detention for a reasonable cause is one thing. Detention on account of ancestry is another."

(d) In *Korematsu* v. *U. S., supra,* this Court upheld a military order excluding Japanese-Americans from a military area as not infringing on the liberty protected by the due process clause of the Fifth Amendment.

Again at page 218, this Court said:

> "True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 P. M. to 6 A. M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."

In the instant case, no reason is given in justification of the restriction on the educational rights of petitioners.

The only apparent reason is the race or color of petitioners, a reason sternly interdicted by this Court.

2. *The restrictions must be for a purpose which government has authority to effect.*

(a) In *Pierce* v. *Society of Sisters, supra,* this Court invalidated a state statute the purpose of which was "to compel general attendance at public schools by normal children, between eight and sixteen." (page 531) In concluding that the State had no authority to effect this purpose, this Court said at page 535:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

In the instant case the apparent purpose of the action of respondents complained of, is, as to public education in the District of Columbia, to compel Negroes to attend only schools attended by Negroes and to accept instruction by Negro teachers only. It is submitted that the Federal Government has no authority to effect such a purpose.

3. *The restrictions must be clearly authorized and if implied authority is relied upon it must appear that the restriction is clearly and unmistakably indicated by the language used in granting the authority.*

(b) In *Ex Parte Endo, supra,* this Court invalidated the detention in a Relocation Center of a loyal Japanese-American because no authority to detain was expressly granted or necessarily implied. At page 297 this Court said:

> "We are of the view that Mitsye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to de-

tain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure."

At page 300, it is said:

"We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Again at page 300 this Court said:

"Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed."

And at page 300, 301, this Court points out

"Neither the Act nor the orders use the language of detention . . . and at page 301, 302 we do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purpose of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program."

In the instant case it is clear therefore that the respondents have no express authority to exclude minor petitioners from Sousa Junior High School solely because of

their race or color. No language of exclusion is found in any Congressional Acts relating to public education in the District of Columbia. It is to be assumed that these Acts were passed for educational purposes and objectives. *It is submitted that no legitimate educational purpose is served by the classification and distinction of pupils solely on the basis of race or color and the exclusion of minor petitioners from Sousa Junior High School by respondents solely because of race or color.* On the contrary, there is abundant authority for the proposition that governmentally enforced racial segregation is in conflict with educational purposes and objectives in our democratic society.

4. *The restrictions must have a reasonable relation to an authorized purpose within the competency of the government to effect.*

In *Hirabayashi* v. *U. S., supra,* Mr. Justice Douglas said in his concurring opinion at page 106:

> "Where the orders under the present Act have some relation to 'protection against espionage and against sabotage' our task is at an end."

In *Korematsu* v. *U. S., supra,* this Court said at page 218:

> "But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."

In the instant case, the exclusion of minor petitioners from Sousa Junior High School solely because of race or color has no reasonable relation to any educational purpose suggested by respondents, for they have suggested no purpose. It is submitted that no purpose, within the competency of the government to effect can be advanced in this case.

e.

The Action of Respondents, Challenged by Petitioners, Arbitrarily Restricts Educational Rights of Petitioners in Violation of the Fifth Amendment.

Briefly stated, the action of respondents, in refusing to admit minor petitioners to Sousa Junior High School solely because of the race and color of petitioners, is a restriction on the educational rights of minor petitioners to acquire the type of education they desire and which is offered by the government for the District of Columbia. Moreover, the actions of respondents complained of restricts the liberty of choice of petitioners who are parents of minor petitioners in their selection of the type of education and teachers offered by the government of the District of Columbia. The existence of compulsory school laws with criminal sanctions enforceable by respondents serves to emphasize the reality of the restrictions.

The purpose of the challenged restrictions is plain. It is to compel petitioners who desire to avail themselves of the public education offered by the government of the District of Columbia, to receive such education with members of their race only, and only from teachers who are members of their race.

It is respectfully submitted that this attempt by the respondents to classify citizens on the basis of race alone, for the purposes of public education in the District of Columbia, is an arbitrary restriction on constitutionally protected educational rights; and that such restrictions violate the due process clause of the Fifth Amendment under the general doctrine enunciated by this Court touching rights guaranteed by the due process clause to parents and children in respect of attendance upon schools.

At the threshold, there is serious question as to whether the challenged restrictions are authorized.

Should this Court decide that the challenged restrictions are authorized, the limitations to such a holding enunciated by this Court require a showing that there is "adequate reason" for the challenged restrictions.

This Court has never yet recognized *any* reason as adequate to validate *any* purely racial restrictions on fundamental educational rights protected by the due process clause of the Fifth Amendment. Moreover, this Court has decried the use of race alone as the basis for classifying citizens for any purpose, and has held racial classifications valid under the Fifth Amendment only where the War Power of the Federal Government was invoked and there was a reasonable relation between the racial classification and the temporary purpose of protecting the nation against the iminent threat of sabotage and espionage. *Hirabayashi* v. *United States, supra; Korematsu* v. *United States, supra.*

Moreover, where the temporary threat to national security was found not to exist, the racial restriction was held violative of due process. *Ex parte Endo, supra.*

f.

Petitioners Sustain Injury as the Direct Result of the Action of Respondents in Excluding Minor Petitioners from Sousa Junior High School Solely Because of Race or Color.

The exclusion of minor petitioners from admission to Sousa Junior High School, solely because of race or color is a deprivation of *petitioners' constitutional rights to acquire useful knowledge, to choose a particular public school, and to enjoy public educational opportunities without government enforced limitations or restrictions based solely on race or color.* That injury continues and is not removed or even lessened by reason of the fact that minor petitioners "do now attend a junior high school in said District", allocated by respondents for the instruction of Negro children. Beyond question the deprivation of a constitutional right is injurious per se. See *Cummings* v. *Missouri,* 4

Wall. 277, 320 (1866), where this Court observed that "liberty" includes "freedom from outrage on feelings as well as restraints on the person."

All of the injury shown by petitioners under the succeeding Point 2 of this brief, in reference to a Bill of Attainder supports the contentions here made. Any deprivation of a freedom of choice solely on the basis of race or color is violative of petitioners' civil rights and thus injurious. To be compelled to attend school because of the compulsory school law, D. C. Code 1951 Ed., Title 31, Secs. 201, 207, and then to be compelled to accept segregation on the basis of race or color and to have one's feelings outraged is injurious per se. The deprivation of a civil right is an injury. *Giles* v. *Harris*, 189 U. S. 475, 485 (1903).

2.

Such An Interpretation Would Render These Acts Bills of Attainder.

Article I, Section 9, Clause 3 of the Constitution of the United States provides that—"No Bill of Attainder or ex post facto law shall be passed.[7]

The Board of Education of the District of Columbia took the position, which was confirmed in the *Carr* case, *supra*, and was relied upon by the Court in the case below, that the statutes enacted by Congress governing public schools in the District of Columbia compelled it to segregate Negroes from whites in the school system.

It is clear that, if respondents and the Court of Appeals in the *Carr* case are right in their interpretation then these statutes are Bills of Attainder, for they compel the exclusion of minor petitioners from Sousa Junior High School solely on account of their race or color, and they are in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States, for:

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[7] For historical background of bills of attainder in America and in England see Notes, 46 Col. L. Rev. 849, Notes, 21 Tulane L. Rev. 278, 2 Story, Commentaries on the Constitution of the United States (5th Ed. 1891) 216, Adams, Constitutional History of England (1935) 228, Holdsworth, History of English Law (4th Ed. 1927) 381.

a. They are legislative or congressional statues.

b. They are directed at named or easily ascertainable persons—namely, Negroes.

c. They inflict punishment on these persons. This punishment is arbitrary.

d. They inflict punishment without a judicial trial.

e. They convict Negroes of the "crime" of being inferior by reason of birth, color and blood, or of being descendents of slaves.

a-b.

These Are Acts of Congress and These Petitioners Are Easily Ascertainable Members of a Group.

It is obvious that these are Acts of Congress, and *United States* v. *Lovett,* 328 U. S. 303, 315-316 (1946), held "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." Negro children certainly constitute an easily ascertainable group, especially since, under the rule of *Wall* v. *Oyster, supra,* the Board is empowered to determine race for itself, and may force pupils and their parents to accept that determination. Just as in the *Lovett* case, *supra,* the present case involves punishment without judicial trial, and determined by no previous law or fixed rule. A judicial trial would at least provide safeguards against arbitrary action which is inherent—if not implicit—in an administrative condemnation such as the Board of Education's segregation rule. *United States* v. *Lovett, supra.* According to this Court in *Oyama* v. *California,* 332 U. S. 633, 646 (1948), only exceptional circumstances can excuse racial discrimination by law, and such distinctions must be justified by the agency practicing the discrimination. This has never been done with respect to segregation in the public schools of the District of Columbia.

There can be no doubt that segregation in our public schools is aimed at Negroes. Cf. *Railroad Co.* v. *Brown*, 17 Wall. 445, 452-453 (1873).

In *Cummings* v. *Missouri*, *supra*, at page 327, the Supreme Court declared: "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms define any crimes or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared." This passage surely fits the position in which appellants are placed by appellees. What legislatures may not accomplish directly, they may not effect by indirection. *Ex Parte Garland*, 4 Wall, 333, 380 (1866); *United States* v. *Lovett*, *supra*. Neither may they act so as to secure by implication that which would be invalid if expressly provided. *Oyama* v. *California*, *supra*.

It is the function of the courts to protect citizens against discriminatory acts such as those presented in this case. Where else can one turn in the face of the disgrace and ignominy heaped upon petitioners by respondents? To paraphrase this Court in *United States* v. *Lovett*, *supra*, what is involved here is a proscription by the Board of Education of more than 50,000 Negro chilren, prohibiting their ever attending a school simultaneously occupied by white children. Were this case held not to be justiciable, Board action, aimed at a large, readily recognizable class, which stigmatized their ancestry and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result.

c.

These Acts of Congress Inflict Punishment on Petitioners.

(1). *Segregation is Punishment.*

That segregation constitutes punishment is the conclusion reached by recognized authorities in the field of so-

ciology, politics, psychology and law, from a consideration of the studies of segregation and its effects.

Gunnar Myrdal, who made a detailed and authoritative study of the entire problem posed by treatment of the Negro minority in the United States, pointed out that what was merely segregation forty years ago is becoming a caste system today. He continued: "The spiritual effects of segregation are accumulating with each new generation, continuously estranging the two groups." (1 Mydral, *An American Dilemma,* 645 (1944).

The process of development from segregation to caste system is described in Mac Iver, *The More Perfect Union,* 67-68 (1948):

> "Now let us consider more closely the manner in which the conditions that are confirmed or imposed by discrimination operate to sustain it. The discriminating group starts with an advantage. It has greater power, socially and politically, and usually it has a superior economic position. Thus it is enabled to discriminate. By discriminating it cuts the other group off from economic and social opportunities. The subordination of the lower group gives the upper group a new consciousness of its superiority. This psychological reinforcement of discrimination is in turn ratified by the factual evidences of inferiority that accompany the lack of opportunity, by the mean and miserable state of those who live and breed in poverty, who suffer constant frustration, who have no incentive to improve their lot, and who feel themselves to be outcasts of society. Thus discrimination evokes both attitudes and modes of life favorable to its perpetuation, not only in the upper group but to a considerable extent, in the lower group as well. A total *upper caste complex* congenial to discrimination, a complex of attitudes, interests, modes of living, and habits of power is developed and institutionalized, having as its counterpart a *lower caste complex* of modes of living, habits of subservience, and corresponding attitudes."

The effects of segregation upon the group segregated have recently been summarized in a note in 56 Yale L.J. 1059, 1061-2 (1947):

> "Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy and discourage racial self-appreciation."

On the other side of the picture, "jim crow" laws, which govern important segments of everday living, not only indoctrinate both white and colored races with the caste conception, but they solidify the segregation existing outside those laws and give it respectability and institutional fixity. (Myrdal, *An American Dilemma*, pp. 579-580). See also Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 Col. L. Rev. 201, 204-205. As the Supreme Court in California has pointedly said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension." (*Perez* v. *Lippold*, 32 Calif. (2d) 711, 725, 198 P. (2d) 17, 25 (1948).) In fields which "jim crow" laws do not cover there has been "a slow trend toward a breakdown of segregation"; within the fields of their operation the laws "keep the pattern rigid." (1 Myrdal, *An American Dilemma*, p. 635).

Professional opinion is almost unanimous that segregation has detrimental psychological effects on those segre-

gated. A questionnaire addressed to 849 representative social scientists was answered by 61% of those to whom it was sent (Deutscher & Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology, 259, 261, 262 (1948)). Of those replying, 90.4% believed that enforced segregation has "detrimental psychological effects" on those segregated if "equal facilities" are provided; 2.3% expressed the opposite opinion, and 7.4% did not answer the question or expressed no opinion (Id., 261, 266). Those who elaborated their position with comments (55% of those replying) stressed that segregation induced feelings of inferiority, insecurity, frustration, and persecution, and that it developed, on the one hand, submissiveness, martyrdom, withdrawal tendencies, and fantasy, and on the other hand, aggression (Id., 272, 277).

The resentment and hostility provoked by segregation find various means of psychological "accommodation", various forms of release (Prudhomme, *The Problem of Suicide in the American Negro*, 25 Psychoanalytic Review, 187, 200). Mediocrity is accepted as a standard because of the absence of adequate social rewards or acceptance (Dollard, *Caste and Color in a Southern Town*, 424 (1937)). (McLean, *Group Tension*, 2 Journal of American Medical Women's Association, 479, 482). Energy and emotion which might be constructively used are lost in the process of adjustment to the "jim crow" concept of the Negro's characteristics and his inferior status in society (Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do To The Individual and to His Relationship with Other People?*, 29 Mental Hygiene, 189, 190, 191 (1945)).[8] Psychosomatic disease is induced by the tensions engendered by segregation and other forms of racial discrimination. (McLean, *Psychodynamic Factors in Racial Relations*, 244 The Annals of the American Academy of Political and Social Science (March, 1946), 159, 161).

[8] For a general discussion of the effects of the caste system, which segregation supports and exemplifies, on Negro personality and behavior, see Myrdal, An American Dilemma, vol. II, pp. 757, 767.

It is further submitted that any suggestion that no punishment is inflicted ignores the basic realities of the situation. The whole theory upon which a segregated school system is maintained is that the dominant class regards the subject group so far inferior as to require quarantining the latter during school hours, to avoid contamination or pollution of the children of the dominant group. Realization of this motive, when it first comes to a child of the segregated class, cannot help but cause mental anguish (i.e., constitutes injury) and repeated reminders of the implications of segregation keep one's awareness of the badge of inferiority fresh during the remainder of one's life.

According to the Brief *Amicus Curiae* of the Committee of Law Teachers against Segregation in Legal Education before the Supreme Court of the United States in *Sweatt* v. *Painter, supra*, at p. 33, "The institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational, economic and political development and prevents him from exercising his rightful powers as a citizen. It creates maladjustments and tensions which sap the vitality of our society."

In addition to the conclusions by experts in the field that segregation is punishment, this Court has characterized similar results of State and Federal statutes as punishment. The rights protected by due process of law include life, liberty and property. Any statute directed at a named individual or an easily recognizable class, which seeks to punish by deprivation or suspension of any of these rights without a judicial trial is a bill of attainder. *Cummings* v. *Missouri, supra.* This Court, in the *Cummings* case, said at pages 321-322: "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all

are equal before the law. Any deprivation or suspension of these rights for past conduct is punishment, and can be in no otherwise defined." The acquisition of knowledge is one of the protected rights. *Meyer* v. *Nebraska, supra. The permanent prohibition against attendance in non-segregated schools is as much punishment as one which perpetually restrains one from serving the Government. United States* v. *Lovett, supra.*

Any contention that no injury is inflicted should be considered not only from the point of view of the contentions advanced in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and in *Henderson* v. *United States,* 339 U. S. 816 (1950), but in the light of *Oyama* v. *California, supra,* at page 646;

> "There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land . . ."

Adult petitioners are certainly subject to punishment if they attempt to enforce the right of their children to sit in school with white children, either by withholding[9] their children from attendance at a segregated colored school, or by an attempt to place them at a segregated white school. *Petitioners and all other persons who are under the interdiction of the statutes as interpreted by the Board*[10] *are*

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[9] For full text of compulsory statute see Appendix B, D. C. Code 1951 Ed., Title 31, Sec. 201, 207.

[10] "Without any doubt there is also in the white man's concept of Negro 'race' an irrational element which cannot be grasped in terms of either biological or cultural differences. It is like the concept 'unclean' in primitive religion. It is invoked by the metaphor 'blood' when describing ancestry. The ordinary man means something particular but beyond secular and rational understanding when he refers to 'blood'. The one who has got the smallest drop of 'Negro blood' is as one who is smitten by a hideous disease. It does not help if he is good and honest, educated and intelligent, a good worker, an excellent citizen and an agreeable fellow. Inside him are hidden some unknown and dangerous potentialities, something which will sooner or later crop up." 1 Mydral, 100.

attainted by reason of their birth, blood and pigmentation, and there is no way in which they can overcome the obstacles placed in their way by respondents.

(2). *This Punishment is Arbitrarily Imposed.*

We submit that it may properly be held that punishment is arbitrarily imposed where an act forbidden bears no relation to the object allegedly sought to be achieved. And it is certainly true in this case that discriminating against minor petitioners because of their birth, color and blood and the previous servitude of their grandparents or great-grandparents bears no relation whatsoever to their educability in a public school together with white children.

This argument is supported by the following quotation in Petition and Brief in Support of Petition for Writ of Certiorari in the Supreme Court of the United States in *Sweatt* v. *Painter, supra:*

> "Dr. Robert Redfield, Chairman of the Department of Anthropology at the University of Chicago, testified, as an expert, that there is no recognizable difference as to capacities between students of different races and that scientific studies had concluded that differences in intellectual capacity or ability to learn have not been shown to exist between Negroes and other students. He testified that as a result of his training and study in his specialized field for some twenty years, it was his opinion that given a similar learning situation with a similar degree of preparation, one student would do as well as the other, on the average, without regard to race or color."

In regard to the question of a relationship between the act punished and the objective of the punishment, the Supreme Court had this to say at pages 319-320 in *Cummings* v. *Missouri, supra:*

> ". . . There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military serv-

ice of the United States and his fitness to teach the doctrines or administer the sacraments of his church, nor can a fact of this kind or the expression of words of smypathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or *not* for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

"The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him any thing less than these is no punishment at all.' The *learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraint on the person.* He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office

> may be punishment as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." (Italics supplied.)

As we have already stated, in the present case there is absolutely no relation between color and educability. Therefore, when the respondents maintain separate schools for colored and white children, they seek to insult and degrade the former, not to educate. And, since it is thus a crime to be colored, Negro children are being arbitrarily punished by being singled out and deprived of their rights and privileges—i. e., to be given the same education under the same conditions as any other child, whatever his color. Further, respondents clearly do not include in their definition of liberty freedom from outrage on the feelings, since they inflict such arbitrary punishment on more than half the children under their jurisdiction every day they operate. There is no requirement that there must have been a previous enjoyment of a right. A study of the entire passage shows clearly that the Court means by any right previously enjoyed, any right constitutionally possessed.

We have already adverted to the fact that the lack of any relationship between the methods used and the end sought to be attained is sufficient to constitute arbitrary imposition of punishment. Mr. Justice Murphy, in a concurring opinion in *Oyama* v. *California*, *supra*, observed that no rational basis for legislation existed where laws discriminating against citizens were motivated by racial hatred and intolerance.

And in *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), this Court used racial discrimination as a standard for striking down a State law providing for sterilization of certain offenders, in the following terms: "When the law lays an unequal hand on those who have committed

intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Having shown that minor petitioners have, in fact, suffered injury and punishment by reason of their segregation, and that the segregation on account of race or color may properly be regarded as wholly arbitrarily imposed punishment, we proceed to examine the other elements of a bill of attainder.

d.

No Trial or Hearing Is Given Petitioners.

In a bill of attainder punishment is inflicted without a judicial trial, *Cummings* v. *Missouri, supra.* In the case at bar, nothing can be clearer than that, if the Board of Education is right in its contention that these Congressional Acts bar any Negro child, at any time, from attending a public school designated for use of white children, solely on the basis of race or color, these minor petitioners have been found guilty of being Negroes and convicted of the offense of possessing some inherent defects which render them unfit to attend Sousa Junior High School without a judicial trial. *There has never been a finding, either by the Board or by Congress, that all Negro children, or any particular individuals among them constituted any such menace to white pupils as would warrant isolating all Negroes in schools limited by law to their sole use.* No reason for segregation has ever been announced. And there has certainly been no attempt to try these individual minor petitioners to determine whether there is any valid ground for depriving them of their right to associate free of a limitation based on their race or color alone in school activities with white children of their own age.

e.

These Petitioners Are Convicted on Past Acts of a Crime by These Acts of Congress.

In *Cummings* v. *State of Missouri, supra,* page 323, this Court defined a bill of attainder as " . . . a legislative act which inflicts punishment without a judicial trial." The opinion then continued: "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The remainder of the opinion is, we think, particularly appropriate in the present case: "In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Certainly the portion of the opinion just quoted fits the present situation. If the Board, in acting for the legislature is compelled by statute to segregate Negroes and whites, it is acting under legislation which has convicted Negroes of the crime of being inferior by birth, blood, and color and dooms them to separation, without declaring a previous condition of birth, blood or color to be a crime; the guilt attaches to any child the Board sees fit to classify as a Negro (*Wall* v. *Oyster, supra*), without any trial; without any proof that an individual Negro child is in fact so far inferior by birth, blood and color to white children that he may not associate with them in school, it requires that the Negro be taught in a separate schoolhouse; and it fixes the sentence to cover the entire time the child is subject to the jurisdiction of the Board and affects his entire life and deprives him of liberty, property, job opportunity and happiness.

It is manifestly clear that this Court should not interpret these Acts of Congress as compelling racial segregation which would render them unconstitutional when it is possible to interpret them as not requiring segregation and thus render them constitutional. We must assume that Congress enacted these statutes with a constitutional intent. See, *Schneiderman* v. *United States*, 320 U. S. 118, 157, 158 (1943). *This would necessarily mean that they do not compel segregation for if these statutes are interpreted as compelling segregation they would clearly fall within the ban of the constitutional provision against bills of attainder.*

D.

The Denial of Admission of Minor Petitioners to Sousa Junior High School Solely on the Basis of Race or Color Deprives Them of Their Civil Rights in Violation of Title 8, United States Code, Sections 41 and 43.

It is apparent to petitioners that the racially segregated schools of the District of Columbia administered under control of respondents are operated in violation of the Civil Rights Act, Sections 41 and 43 of Title 8, U. S. Code, which provide:

Section 41. Equal rights under the law:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. Section 1977.

Section 43. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Section 1979.

In *Hurd* v. *Hodge,* 334 U.S. 24, 31, this Court, in prohibiting courts of the District of Columbia from enforcement of racial restrictive covenants said of Section 42 of Title 8 U. S. Code, a companion section of Section 41 which is relied upon here:

> All the petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt that for the purposes of this section, the District of Columbia is included within the phrase 'every State and Territory.' Nor can there be doubt of the constitutional power of Congress to enact such legislation with reference to the District of Columbia."

While it is true that petitioners do not rely upon Title 8, U. S. Code, Section 42, the section of the Civil Rights Act considered in *Hurd* v. *Hodge, supra,* but upon Sections 41 and 43, it is hardly possible to conceive that the Supreme Court would make any differentiation in the applicability of these sections to the District of Columbia. The genesis of Sections 41 and 42 are the same. Both sections were originally contained in Section 1, Chapter 31 of the Civil Rights Act of 1866 (14 Stat. 27). Although now placed in different sections of Title 8, U. S. Code, both Sections—41 and 42—secure the rights of persons and citizens in "every State and Territory". Hence, just as under the interpretation of Section 42 in *Hurd* v. *Hodge, supra,* the term "every State and Territory" must be said to include the District of Columbia, as regard Section 41. Any other construction would lack uniformity and would be unreasonable and historically illogical.

Section 43 of Title 8, U. S. Code, is derived from the Act of April 20, 1871, Chapter 22, 17 Stat. 13. As presently entitled under the Code, this section provides for a "civil action for deprivation of rights". Obviously, therefore, if Section 41 of the Civil Rights Act is applicable to the District of Columbia, the section of the Civil Rights Act recognizing the means by which civil rights are vindicated by actions at law or suits in equity is equally applicable to violations of civil rights occurring in the District of Columbia. We conclude, therefore, that both Sections 41 and 43 are within the constitutional power of Congress to enact, and that these sections are operative in the District of Columbia.

The remaining question is whether government enforced racial segregation in the public schools of the District of Columbia is violative of the Civil Rights Act. Petitioners contend that racial segregation in the public schools as enforced by respondent under color of law does violate these sections.

The Congress of the United States, acting pursuant to its powers in the District of Columbia, has provided for public education there. It has given to persons residing within the District the privilege of securing, at public expense, an elementary and high school education. This privilege, we contend, once given must be afforded to all without any racial distinction. The Civil Rights Act compels such a result.

The Civil Rights Act does not specifically mention public education. In fact, there is no specification of the particular rights protected, but rather a broad statement concerning "full and equal benefits of all laws" and enjoyment of "rights, privileges or immunities secured by the Constitution and laws". However, when we view the sections presumably directed against discriminatory governmental action in the light of the provisions of the Act of March 1, 1875, Chapter 114, 18 Stat. 335, concerning racial discrimination by individuals within the United States, *it becomes*

abundantly clear that the sections here under discussion were meant to cover all situations in which, through governmental action, persons are deprived of some right, privilege or immunity recognized under the Constitution and laws of the United States. And these sections were enacted to insure that all citizens, white and black, should be vested with the same rights and the same responsibilities as citizens. Racial distinctions were thereby prohibited.

The cases support this analysis. In *United States* v. *Cruikshank*, 92 U. S. 542, 555 (1875), this Court observed:

> "No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, . . ."

And, in *Virginia* v. *Rives*, 100 U. S. 313, 318 (1879), the Supreme Court stated that:

> "The plain object of these [civil rights] statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Our national policy, as found in the Constitution, laws and treaties of the United States as well as in the applicable legal precedents, renders unlawful the actions of respondents in excluding minor petitioners from attendance at Sousa Junior High School solely because of race and color. In speaking of the Fourteenth Amendment and the Civil Rights Act of 1866, of which Sections 41 and 43 are constituent parts, this Court in *Hurd* v. *Hodge, supra*, at page 32, said:

> ". . . It is clear that in many significant respects the statute and the Amendment were expressions of

> the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land . . ."

In a series of State cases this Court has made clear some prohibitions of the Fourteenth Amendment against government enforced distinctions based solely on race or color. In the case of *Strauder* v. *West Virginia,* 100 U. S. 303, 306, 307 (1879), this Court condemned the systematic exclusion of colored persons from juries. Similarly the right to qualify as a voter in primary or general elections has been protected against denial because of race or color. *Smith* v. *Allwright,* 321 U. S. 649 (1944). This Court has held that the Constitution of the United States prohibits denial to a person, because of his race or ancestry, of the right to pursue his accustomed calling. *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). States may not enforce agreements excluding Negroes from owning or occupying property in white neighborhoods. *Shelly* v. *Kraemer,* 334 U. S. 1 (1948). Nor may railroads segregate Negro passengers in dining cars. *Henderson* v. *United States,* 339 U. S. 816 (1950). Nor may state universities, when they admit Negroes, make any racial distinctions in affording them educational opportunities. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950).

These holdings are clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the school officials of the District of Columbia. Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that exclusion of minor petitioners from Sousa Junior High School solely because of race or color is prohibited by the Civil Rights Act. *That statute by its terms, requires*

that all persons shall have the same rights "as is enjoyed by white citizens . . . to the full and equal benefit of all laws." That minor petitioners have been denied *that right* by virtue of the action of the respondents is clear. They have been denied admission to Sousa Junior High School solely by reason of race or color. It is no answer to petitioners to say that whites may also be denied admission to some Negro school because of race or color.

Speaking on this exact point in *Shelley* v. *Kraemer, supra*, at page 22, this Court, speaking through Chief Justice Vinson, said:

> " . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

That these sections of the Civil Rights Act prohibit racial distinctions is too clear for argument. That these sections encompass the right or privilege of public education is free from any reasonable doubt, for at the very foundation of our democratic institutions, in the preservation of rights and the recognition of the duties of citizens, stands the public school as the logical agency for giving the people the attitudes and skills requisite for effective participation in a democracy. We strongly urge this Court to recognize that the Civil Rights Act prohibits government enforced racial segregation in public education in the District of Columbia.

E.

The Court Below Erred in Not Granting Petitioners the Relief Prayed for and in Granting Respondents' Motion to Dismiss Minor Petitioners' Complaint on the Ground That It Failed to State a Claim on Which Relief Could Be Granted.

Reference to the pleadings in the instant case reveals that the respondents relied upon a motion to dismiss on the sole ground "that the complaint fails to state a claim upon which relief can be granted".

Such a motion to dismiss, as was true of the old common law demurrer, now abolished in the District of Columbia, said in so many words that the allegations of the complaint with all legal inference conceded did not spell out a cause of action. All things alleged for the purposes of the pleadings must be accepted as being true. What then are the essential allegations of the complaint? Clearly and unequivocally the complaint alleges that the respondents with full power of allocation of minor petitioners in the public schools of the District of Columbia, failed to assign the minor petitioners to the Sousa Junior High School and actually refused them admission to said Sousa Junior High School solely because of their race or color. The motion to dismiss concedes the accuracy of this statement. The complaint alleges further that the respondents are construing and applying Acts of Congress so as to require them to deny minor petitioners admission to and to exclude them from the Sousa Junior High School for no other reason than because of their race or color. This allegation the motion to dismiss freely admits. The complaint alleges that every administrative requirement was met in seeking admission of minor petitioners to the Sousa Junior High School. The motion to dismiss agrees that this was done. The complaint alleges that the respondents are pursuing and have pursued the policy, practice, custom and usage of denying minor petitioners admission to and excluding them from attendance as pupils at the Sousa Junior High School and from enjoyment of the educational opportunities afforded therein solely because of their race or color. The motion to dismiss concedes such action on the part of the respondents. The complaint seeks not only injunctive relief to correct these violations of the petitioners' constitutional and statutory rights, but, asks the court to render a declaratory judgment to the effect that statutes enacted by Congress regulating public education in the District of Columbia do not require exclusion of the minor petitioners from the Sousa Junior High School, and that respondents are re-

quired by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinctions with respect to them because of their race or color.

Facing the test to which the complaint was put by the motion to dismiss, the Court below, through Judge Walter M. Bastian, embraced the theory urged by respondents and signed an order dismissing the cause.

"ORDER

"Upon consideration of the complaint, of the motion of the defendants to dismiss the above-entitled cause, of the memoranda of points and authorities in support of and in opposition to said motion and of the arguments of counsel for the plaintiffs and for the defendants, it is, by the Court, this 9th day of April, 1951,

"ORDERED, that the above-entitled cause be, and it is hereby, finally dismissed.

"(s) Walter M. Bastian, Judge."

This order is tantamount to a judicial pronouncement that an admitted statement of denial of civil rights by government officials, solely on the ground of race or color, presents no cause for relief. This order amounts to a direct statement that the defendants below correctly interpreted and put into effect statutes enacted by Congress as compelling racial segregation in the public schools of the District of Columbia, and that said respondents lawfully pursued the policy, practice, custom and usage of denying minor petitioners admission to Sousa Junior High School solely because of their race or color; and that such interpretation, enforcement, and action on the part of said respondents did no violence to the constitutional and statutory rights of the petitioners. The very making of such statements carries its own refutation.

The Court below clearly erred in not requiring the respondents to answer the complaint. The Court also erred in not issuing a declaratory judgment to the effect that no

congressional statute in the District of Columbia could be properly interpreted as requiring racial segregation, and to the effect further that said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them solely because of their race or color. The Court erred in not restraining the action of the respondents in refusing to admit minor petitioners to Sousa Junior High School solely on the basis of race or color, without authority, and in violation of the constitutional and statutory rights of the petitioners.

F.

This Court Should Declare That the Actions of Respondents in Requiring Segregation in the Public Schools Is Unlawful. It Should Direct the District Court to Enter a Decree Ordering That Such Segregation Be Discontinued Forthwith and That Petitioners Be Admitted to Sousa Junior High School Without Distinction As to Race or Color, As Soon As Necessary Administrative Adjustments Can Be Made and in No Event Later Than the Beginning of the Next School Year.

This portion of the brief is directed to questions four and five of the Order of this Court dated June 8, 1953:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> "5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

1.

Petitioners should forthwith be admitted to schools of their choice.

The way in which this question is framed would suggest that this question is not applicable to the *District of Columbia* case, however, in order that this Court may have the benefit of our views, we are assuming that the question is based upon a finding that segregation violates the Fifth Amendment to the Constitution.

"It is fundamental that these cases concern rights which are personal and present". *Sweatt* v. *Painter,* 1950, 339 U. S. 629, 635; see also *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 352. The rights of the parents and their children, with respect to education are fundamental rights guaranteed by the Fifth Amendment against arbitrary action by the Federal Government. *Farrington* v. *Tokushige,* 273 U. S. 284 and see *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Myer* v. *Nebraska,* 262 U. S. 390. They are personal because each petitioner is asserting his individual constitutional right to grow up in our democratic society without the impress of government imposed racial segregation in the public schools. They are present because they

will be irretrievably lost if their enjoyment is put off. The rights of the adult students in *Sweatt, Sipuel, Gaines* and *McLaurin* cases required, this Court held, vindication forthwith. *A fortiori* this is true of the rights of children who are growing through their vital formative years. As to them, "postponement" is a mere euphemism for denial of justice. It follows that petitioners are entitled to be admitted forthwith to Sousa Junior High School without distinction as to race and color. Since the number of named petitioners in this case is small no administrative difficulties can arise as to them.

2.

There is no warrant in equity for postponement of petitioner's enjoyment of their rights.

a.

Petitioners' rights are by nature unsuited to postponement by equity.

Petitioners have no desire to set precise bounds to the reserve discretion of equity. They concede that, as a court of chancery, this Court has power to mold its relief to individual circumstances in ways and to an extent which it would be undesirable to define with entire precision. But the rights established by these petitioners are far outside the class as to which, whether for denial or delay, a nice "balance of convenience" has been or ought to be struck.

The minor petitioners are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born.

We have discovered no case in which such rights, once established, have been postponed to a cautious calculation of conveniences. The nuisance cases, the sewage cases, the

cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

If equity remembers itself, it will indeed mold its remedy to fit petitioners claims—but the molding will be to an artful swiftness.

Affirming the decree of one of the few judges still carrying the traditional title and power of Chancellor, the highest court of Delaware epitomized equity in one of the cases now before this bar when it declared (*Gebhart* v. *Belton*, 91 A. 2d 137, 149):

> " . . . To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled."

b.

Even should this Court proceed to consider the propriety of a decree postponing desegregation, assay of the factors involved makes it clear that in the District of Columbia there is no necessity for a "gradual decree".

Before examining alleged bases for delaying relief to petitioners, three preliminary remarks are necessary.

First, we have, in the main, to guess at the factors respondents might bring forward to support a plea for postponement rather than total denial for they have taken ground from which they can only plead that this shabby business of government compelled racism must be allowed to go on so long as the federal government wills it.

Secondly, in deciding whether sufficient reasons exist for postponing the enjoyment of petitioners' rights, this Court is not resolving an issue upon a mere preponderance of the evidence. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slow in upholding the most vital rights of children accruing to them under the Constitution must make out an affirmative case of crushing conviction to sustain his plea for delay. Respondents have not done this on this record, and it is

hard to see how they can do it in supplementary proceedings or in matters outside the record, for their matter must sound in disputed prophecy, if not in menace, and human prophecy is as shaky a ground for the denial of known present justice as menace is unsuitable to the attention of chancery.

Thirdly, the problem of gradualism cannot fairly arise at all in this case. Here the appeal is from a dismissal of the complaint on motion, and there is in the record no matter whatever suggesting difficulty in accomplishing desegregation. Surely it would be a curious as well as a gratuitous assumption that such a change cannot be expeditiously handled in this nation's capital.

In fact desegregation has proceeded so rapidly in the District of Columbia in the last decade that there is practically no area save in the public schools where segregation is still practiced. Negroes and whites work together, play together and live in the same neighborhoods with no friction. Segregation in street cars and busses has been outlawed in the District of Columbia since 1865, Act of March 3, 1865 (13 Stat. 536, 537). We respectfully request this Court to take judicial notice that;— Negroes are now admitted into many professional groups and voluntary associations formerly for white only, *e.g.*, The District of Columbia Medical Society, American Institute of Architects, American Association of University Women. The largest employer in the District of Columbia, the United States Government, expressly prohibits segregation in its employment policies. The National Capitol Housing Authority has announced that its new housing projects will be and some of its old housing projects have been desegregated. Negroes are presently freely admitted to all Catholic schools and most of the other parochial and private schools in the District of Columbia. White and Negro children attend together a large number of private kindergartens and nursery schools and increasingly play together on the playgrounds under the desegregated policy

of the Recreation Board of the District of Columbia. Negro and white teachers meet together in an integrated teachers' union. Both races attend without segregation all the legitimate theatres, concert and lecture halls as well as most motion picture theatres. Many white and Negroes attend the same churches. Moreover, segregation in restaurants and cafes has been outlawed since 1873 and since that pronouncement of this Court in *District of Columbia* v. *John R. Thompson*, 73 S. C. 1007, Negroes eat, without racial incidents, in all restaurants in the District of Columbia. In the southwest section, white and Negro parents and teachers meet together to plan for neighborhood improvement.

Therefore the factual situation in the District of Columbia makes a gradual decree unnecessary.

We concede that there may well be difficulties and delays of a purely administrative nature involved in bringing about desegregation. Any injunction requires time for compliance and we do not ask the impossible. We strongly urge, however, that no reason has been suggested and none has been discovered by us that would warrant denying petitioners their full rights beyond the beginning of the next school year.

But we do not understand that the "gradual adjustment" mentioned in this Court's fourth and fifth questions referred to such possible necessities.

Finally, it would be strange indeed to find any possible considerations serving to slow the hand of equity. A good part of the early work of the Chancellor's court had to do precisely with the protection of the weak and helpless from powerful local antagonisms (See, *e.g.*, *Inhabitants of Whitby* v. *New York* (1553) in 12 Sheldon Society, Select Cases in the Court of Requests (1889) op. 192-200 and see Introduction, p. XX; see also Maitland, Equity, 4-6 (1936))

Finally, we cannot forget that petitioners, too, place public interests in the balance. Petitioners assert that there is a public interest also in the reaffirmation of a constitutional right fought for and won almost a century ago, namely, the

enjoyment by all of a common citizenship unrestricted by governmentally imposed distinctions based solely on race or color one of the severest embarrassments to our country in its international relations.

3.

This Court should not formulate detailed decrees.

Petitioners urge that this Court make no attempt to formulated detailed decree in this case but rather that it send down its mandate directing that minor petitioners be admitted to Sousa Junior High School and that the Respondents be enjoined from imposing distinctions based on race or color alone in the administration of the public schools of the District of Columbia.

The formulation of a detailed decree would involve this Court and the Court below in elaborate administrative questions having to do with public schools.

Above all, the school boards, the courts, and the people, in the District of Columbia are law-abiding officials and citizens. They have acted in good faith under their view of the law. We believe that this Court may confidently anticipate that an authoritative holding, and an injunction in general terms, will be all that is needful to bring about compliance with the Constitution and that respondents will address themselves sincerely to the task of complying with the law.

4.

Petitioners are unable, in good faith, to suggest terms for a decree for an effective gradual adjustment, for they sincerely believe that no such decree will be efficacious in protecting petitioners' rights while at the same time minimizing purported difficulties attendant on desegration.

While desiring to answer responsively the Fifth question posed by the Court in setting this case down for reargument, petitioners have been unable to visualize any *bona*

fide criteria for determining a method of delay that would protect the constitutional rights of the named petitioners and the class they represent to admission to public schools on a non-segregated basis.

As already noted, petitioners concede the possibility of delay until the next school year by reason of administrative requirements. Beyond this, petitioners respectfully submit that their duty to this Court may better be discharged by commenting upon any plans for postponement that may be put forward by respondents, than by the *pro forma* proposal of decree terms which they believe unwise and unwarranted.

5.

This Court should not appoint a master.

It follows that there is no need for this Court to appoint a master. Since repeal in 1948 of the 1805 Statute forbidding the introduction of new evidence at an appellate level, there would appear to be no reason why such master could not be appointed (280 U. S. C. § 863 (1946)). Certainly respected authorities have recommended the practice of appellate courts' taking evidence (see 1 Wigmore, Evidence § 41 (3d ed., 1940); Pound, "Appellate Procedure in Civil Cases" (1941) pp. 303, 387; Note, 56 Harv. L. Rev. 1313 (1943)) and in other times and jurisdictions it has been respected practice. (See Smith, Appeals of the Privy Council from American Plantations 310 (1950); Rules of the Supreme Court of Judicature, order 58, Rules 1, 2; cf. New Mexico, St. 1949, Mar. 17, c. 168, § 19.) However, taking of evidence by master is undoubtedly a departure from normal practice on appeal and it may result in loss of time to the prejudice of petitioner's rights.

6.

The terms of the decree we believe should be stated by the District Court.

This Court should remand this case to the District Court with instructions to that Court to enter an order granting an injunction restraining respondents from denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color and ordering respondents to cease discriminating on the basis of race or color in administering the public schools in the District of Columbia.

CONCLUSION.

The question whether the Federal Government has the power to compel the segregation of pupils on the basis of race or color alone in affording educational opportunities in the public schools in the District of Columbia is here presented to this Court for the first time. Here no question of equality of facilities is in issue. Here is raised the sole question whether under our democratic system and the protective covering of our Constitution, Congress or public school officials, either or both, have the power to bar Negroes from studying with whites in public schools in the District of Columbia because of their race or color alone. No reason or justification is offered by the respondent nor, in the opinion of the petitioners, can any be given, save the dubious one that the Acts of Congress compel it.

Our international relations, our concepts of liberty, our belief in democracy, cannot be reconciled with government imposed racial segregation in education in the District of Columbia. The history of our country, the loyalty of the Negro, the decisions of this Court, all require a condemnation of this un-American practice.

Government action has passed beyond the brink of constitutionality when it imposes disabilities upon the Negro people, loyal in war and in peace, native born citizens, limiting their liberty of choice of schools solely because of their

race or color. This Court has approved of comparable federal action only when the fate of the Nation was at stake, and even then, it subjected the Government's action to a searching inquiry and laid down definite standards which the Government was required to meet. The actions of respondents in the instant case not only were not taken under such perilous circumstances, but did not meet even the minimum standards set for imposing racial distinctions under those conditions.

Wherefore it is respectfully submitted that the decree of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A.

Statutory and Constitutional Provisions in the States Where Segregation in Education Is Institutionalized.

ALABAMA

". . . Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Constitution. Article XIV, Section 256, 1901.

ARKANSAS

"Duties. The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

"(c) Establish separate schools for white and colored persons." (Acts 1935, No. 184, Sec. 97, page 2880; Pope's Digest, Sec. 11535.)

DELAWARE

"In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the States as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law." Constitution. Article X, Sec. 2, 1897.

FLORIDA

"White and colored children shall not be taught in the same school, but impartial provision shall be made for both." Constitution. Article XII, Sec. 12, 1885.

GEORGIA

"There shall be a thorough system of common schools for the education of children *in the elementary branches of an English education only,* as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." Constitution. Article VIII, Sec. 1, Para. 1, 1877. (Language in italics was deleted in 1912.)

KENTUCKY

"In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained." Constitution. Sec. 187, 1890.

LOUISIANA

". . . Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; provided, that kindergartens may be authorized for children between the ages of four and six years." Constitution. Article XII, Sec. 1, 1921.

MARYLAND

"All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted."

An. Code, 1924, Sec. 114; 1912, Sec. 63. 1904, Sec. 59. 1888, Sec. 54. 1872, Ch. 377. 1916, Ch. 506, Sec. 63.

"It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools."

An. Code. 1924, Sec. 200; 1912, Sec. 131; 1904, Sec. 124; 1888, Sec. 96; 1872, Ch. 377; 1904, Ch. 584; 1916, Ch. 506, Sec. 131; 1922, Ch. 382, Sec. 131; 1937, Ch. 552.

"Each colored school shall be under the direction of a district board of school trustees, to be appointed by the county board of education subject to the provisions of Section 8 of this article, and schools for colored children shall be subject to all the provisions of this Article."

An. Code, 1924, Sec. 201; 1912, Sec. 132; 1904, Sec. 125; 1888, Sec. 97; 1870, Ch. 311; 1872, 377, Sub-Ch. 18, Sec. 2; 1874, Ch. 463; 1916, Ch. 506, Sec. 132.

"It shall be the duty of the county board of education in each county of the State, when in their judgment there is need thereof, to provide a suitable building or room, or rooms, connected with one of the colored schools of said county, for the establishment of a central colored industrial school, and to provide for the maintenance of such central colored industrial school where instruction shall be given daily in domestic science and in such industrial arts as may be determined by the county board of education. One-half of the appropriation hereinafter provided shall be used for the maintenance of such industrial school."

An. Code, 1924, Sec. 211; 1912, Sec. 142; 1904, Sec. 139; 1898, Ch. 273, Sec. 5; 1910, Ch. 210, Sec. 139 (p. 232); 1916, Ch. 506, Sec. 142.

"Whenever any such colored industrial school is opened in any county the secretary of the county board of education shall report the fact to the state superintendent of schools, and he, or an assistant designated by him, shall visit the said school and shall give, if in his judgment it is warranted, a certificate of approval of the conditions and the plan upon which said industrial school is conducted, to the secretary of the county board of education. The state superintendent of schools shall submit annually to the Comptroller of the treasury of the State on or before the last day of September, a complete list of such schools as are entitled to receive the special appropriation for industrial education."

An. Code, 1924, Sec. 212; 1912, Sec. 143; 1904, Sec. 140; 1898, Ch. 273, Sec. 6. 1910, Ch. 210, Sec. 140 (p. 232). 1916, Ch. 506, Sec. 143.

"There shall be located in the city of Baltimore or elsewhere (if the board of education deem best) a state normal school for the instruction and practice of colored teachers in the science of education, the art of teaching and the mode of governing schools, to be known as State Normal School No. 3; the said school shall be under the control of the state board of education, who shall appoint the principal and necessary assistants; and the faculty shall consist of a principal and as many teachers as the board shall appoint. The sessions of the school shall be determined by the state board of education, who shall prescribe the curriculum of study, which however, shall include courses for the special preparation of instructors for teaching the elements of agriculture and mechanic arts, provide necessary quarters, supplies and apparatus, fix the qualifications for admission as students, the salary of the principal, assistant teachers and employees."

An. Code, 1924, Sec. 256; 1912, Sec. 193; 1908, Ch. 599.

MISSISSIPPI

"Separate school shall be maintained for children of the white and colored races."

Constitution. Article VIII, Sec. 207, 1890.

MISSOURI

"Separate free public schools shall be established for the education of children of African descent."

Constitution. Article XI, Sec. 3, 1875.

NORTH CAROLINA

"The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of, either race."

Constitution. Article IX, Sec. 2, 1868; Convention, 1875.

OKLAHOMA

"Separate schools for white and colored children with like accommodations shall be provided by the Legislature and impartially maintained. The term "colored children," as used in this section, shall be construed to mean children of African descent. The term "white children" shall include all other children."

Constitution. Article XIII, Sec. 3.

"The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races, with impartial facilities for both races." (Laws 1949, p. 436, Art. 5, Sec. 1.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-1.

"Any teacher in this state who shall wilfully and knowingly allow any child of the colored race to attend the school maintained for the white race or allow any white child to attend the school maintained for the colored race shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), and his certificate shall be cancelled and he shall not have another issued to him for a term of one (1) year." (Laws 1949, p. 537, Art. 5, Sec. 4.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-4.

"It shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school, or institution in violation hereof shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and each day such school, college or institution shall be open and maintained shall be deemed a separate offense.

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-5.

SOUTH CAROLINA

"Separate schools shall be provided for the children of the white and colored races, and no child of either race shall

ever be permitted to attend a school provided for children of the other race."

Constitution. Article XI, Sec. 7, 1895.

TENNESSEE

"Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government, to cherish literature and science. And the fund called the *common school fund*, and all the lands and proceeds thereof, dividends, stocks and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools and all such as shall hereafter be appropriated, shall remain a *perpetual fund*, the principal of which shall never be diminished by *legislative* appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools. The State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the Colleges, Universities, or Academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time."

Constitution. Article XI, Sec. 12, 1870.

TEXAS

"Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Constitution. Article VII, Sec. 7, 1876.

VIRGINIA

"White and colored children shall not be taught in the same school."

Constitution. Article IX, Sec. 140, 1902.

WEST VIRGINIA

"White and colored persons shall not be taught in the same school."

Constitution. Article XII, Sec. 8, 1872.

APPENDIX B.

District of Columbia Compulsory Attendance Law.

Every parent, guardian, or other person residing permanently or temporarily in the District of Columbia who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately during the period of each year in which the public schools of the District of Columbia are in session: Provided, that instruction given in such private or parochial school or privately, is deemed equivalent by the Board of Education to the instruction given in the public schools. 43 Stat. 806, Ch. 140, Art I, Sec. 1 (D.C. Code, 1951 Ed., Title 31, Sec. 201).

The parent, guardian, or other person residing permanently or temporarily in the District of Columbia and having charge or control of any child between the ages of seven and sixteen years who is unlawfully absent from public or private school or private instruction shall be guilty of a misdemeanor, and upon conviction of failure to keep such child regularly in public or private school or to cause it to be regularly instructed in private, shall be punished by a fine of $10 or by commitment to jail for five days, or both, at the discretion of the court: *Provided*, that each two days such child remains away from school unlawfully shall constitute a separate offense: *Provided* further, that upon conviction of the first offense, sentence may, upon payment of costs, be suspended and the defendant placed on probation."

43 Stat. 807, Ch. 140, Art. II, Sec. 1 (D. C. Code, 1951 Ed., Title 31, Sec. 207).